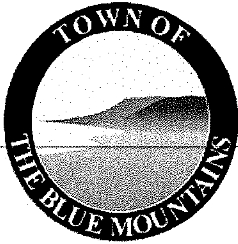
STAFF REPORT: PLANNING & BUILDING SERVICES



REPORT TO:	**Planning & Building Committee**
MEETING DATE:	**October 4, 2010**
REPORT NO.:	**PL.10.95**
SUBJECT:	**Drive-through Facilities Study Update**
PREPARED BY:	**David Finbow, Director Planning & Building Services**

A. Recommendations

THAT Council receive Staff Report PL.10.95 respecting Drive-through Facilities Study Update for information purposes.

B. Background

The purpose of this Report is to provide Council with an update on the subject matter subsequent to the Statutory Public Meeting held under the *Planning Act* on September 8, 2010, whereas Victor Labreche of Labreche Patterson & Associates Inc., acting on behalf of the Ontario Restaurant Hotel and Motel Association (ORHMA), advised the Planning & Building Committee that his client is objecting and opposed to the Draft Official Plan Amendment (OPA) for Drive-through Facilities along with the proposed two Zoning By-law Amendments. A copy of his written submission is included as Attachment A.

Town Staff and the Town's Consultant, Meridian Planning, have now had an opportunity to review and discuss the submission of the ORHMA and believe there is an opportunity to resolve their concerns as well as maintaining consistency with the current Official Plan (OP), draft Community Improvement Plan (CIP), draft Planning, Urban Design and Sustainability Study (PUDS) and other relevant documents. In this regard, Town Staff will be meeting with the ORHMA on October 5, 2010, to further discuss this.

C. The Blue Mountains' Strategic Plan

Providing a strong, well managed municipal government.

D. Budget Impact

N/A

E. Attached

1. Letter dated September 8, 2010, from Victor Labreche, Labreche Patterson & Associates Inc., regarding public meeting on proposed Official Plan and Zoning By-law Amendments for Drive-through Facilities Report No. – PL.10.58 and Drive-through Facilities Options Report No. PL.10.52.

Prepared by:

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Labreche Patterson & Associates Inc.
Professional Planners, Development Consultants, Project Managers

September 8, 2010

(E-mailed: cgiles@thebluemountains.ca
and hand delivered to Town Council)

Ms. Corrina Giles
Town Clerk
Town of The Blue Mountains
26 Bridge Street East
P.O. Box 310
Thornbury, ON
N0H 2P0

Dear Ms. Giles:

Re: Public Meeting on Proposed Official Plan and Zoning By-law Amendments for Drive-through Facilities Report No. – PL.10.58 and Drive-through Facilities Options Report No. PL. 10.52

Further to our previous written submission to you and Town Council on July 12, 2010 and that of the TDL Group Corp. (operators and licensors of Tim Hortons Restaurants) on June 7, 2010, we are providing you this letter with more specific comments on the proposed Official Plan amendment (OPA) and Zoning By-law amendments (ZBA) on drive-through facilities to be considered and discussed at the public meeting as required by the Planning Act on September 8, 2010.

As we previously advised, we represent A & W Food Services of Canada Inc., McDonald's Restaurants of Canada Ltd., the TDL Group Corp., and Wendy's Restaurants of Canada Inc. as well as their industry group association, the Ontario Restaurant Hotel and Motel Association (ORHMA). We are providing this written submission to you on behalf of our clients after having reviewed the above noted staff report.

As was stated in our previous letter dated July 12, 2010 and also contained in the above noted TDL letter dated June 7, 2010, we continue to be very concerned and object to the completion and circulation of the proposed OPA and ZBA for drive-through facilities (DTF) in advance of the formal public meeting and completed consultation with the public and the brands noted above and their industry association. The fact that the OPA and ZBA for DTF was prepared and received by Council on July 12, 2010 in advance of the public meeting essentially sets in stone the course of action on this policy matter even though there are important planning and legal implications and critical information that Town staff, its consultants, and Council are missing. On this point, and as attached to the previous TDL letter dated June 7, 2010 and provided again as attached hereto, is a memorandum from legal counsel for the above noted brands and the ORHMA detailing case law both from the Ontario Municipal Board (OMB) and the courts that Official Plan based prohibitions on DTF are not appropriate. Specific Official Plan based performance standard type policies may be appropriate for an identified area(s) of a given municipality but prohibitions at the level of the Official Plan are not.

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The proposed OPA and ZBA are extremely severe with respect to DTF which **completely** removes all existing "as of right" permissions without having first applied for and obtaining approval of a site specific zone change which would be even further restricted to a very limited area along Highway 26 in the Thornbury area, as specified by the proposed OPA. As we noted in our previous July 12, 2010 letter, this policy and zoning direction is clearly tantamount to a town wide prohibition which is not acceptable. We have recently discussed this proposed policy direction with legal counsel for our clients and they advise that the Town's direction on this is considered a "place holder by-law" which the OMB considers to be inappropriate and not in accordance with acceptable planning practices. In a recent OMB case: Re: Regional Municipality of Waterloo Official Plan Amendment No. 58, case #PL050611, M.C. Denhez, Jan. 14, 2010, the Board notes that *"the primary thrust of planning is to replace "ad-hoc" decision making with a "policy-led" system of forethought and predictability. A 'placeholder by-law does the exact opposite: it sets aside an as-of-right use. Its purpose is to avoid offering predictability, so that it can instead vest discretion -- but without the statutory framework of Sections 36, 41, or 70.2 of the Planning Act".* Based on the foregoing and the referenced case law, we ask that the Town no longer consider an Official Plan based prohibition on DTF and also substantially scale back the proposed ZBA which would require that a DTF obtain a ZBA in all cases. We suggest that option #4 ("Permit in all Commercial Areas Based on Established Criteria") as outlined on page 19 of the "Background & Options Paper for Regulating Drive-Through Facilities in the Town of The Blue Mountains" prepared by Meridian Planning Consultants Inc. dated June 2010 appears to be the most reasonable approach and we would like to discuss this option further with the Town and its consultants.

Having detailed our above concerns and objections to the Town's proposed overall policy directions and the Town's process it has followed to date to bring these directions forward together with the specific case law concerns, we will now provide our detailed comments on the staff reports prepared on this matter and that of the background and options paper prepared by the Town's consultants. However, prior to detailing our comments further it is important to look at DTF rationally, objectively, and not subjectively. One needs to consider the context of where and how they locate and operate in any municipality. Firstly, a DTF locates on existing heavily travelled roads, as such they are not typically considered a "destination oriented" use in the same way a grocery store or a retail/service commercial area is considered. The DTF relies on what is considered "pass-by traffic". In other words, drivers typically utilize them because they find it convenient while on their way to work, grocery/retail shopping, heading to a recreation event such as hockey or soccer, etc. as these are the main purposes for the driver being on the road. Therefore, a DTF is not considered a traffic generator. A DTF functions similar to and takes the place of what the function of the otherwise permitted parking lot is which is to accommodate customers to obtain the service of the main use being the restaurant. A properly designed DTF is able to service a much higher volume of customers more effectively and efficiently than the parking lot. Studies that we are aware of show that for these restaurant brands that do not have a DTF as a service option available to the customers and are only relying on a parking lot to accommodate customers, those parking lots need to be larger which leads to more asphalt heating, less compact form of development, and more vehicles with greater start up emissions occurring compared with a site with an available DTF service option being available together with the parking lot. It is important to understand that DTF locate anywhere a parking lot would otherwise be located. As such, we question why the Town is proposing a town wide prohibition on DTF but parking lot restrictions or prohibitions do not exist. Provided DTF are regulated by typical requirements for vehicle stacking and reasonable setbacks together with Urban Design Guidelines, they are no different or less compatible than the otherwise permitted parking lots for any restaurant, retail or service commercial use.

It is important to note with regards to the efficiencies of DTF compared to the alternative, which is larger parking lots, that the OMB has accepted evidence, particularly in the City of Ottawa case, that DTF lessen the demand requirement for parking and specifically the Board noted: *"that drive-through trips are not typically destination trips, but rather, are drawn from pass by traffic that is already on the*

road driving to a commuter transit station (as one example of the destination trip) irrespective of the drive-through use being there, hence, drive-throughs do not promote auto dependency, and, furthermore, that drive-through facilities reduce the parking requirements for quick service restaurants." Further on this point, evidence accepted by the OMB in previous hearings indicates that when a DTF is present in a restaurant use, the effect on parking use is such that the parking requirement should be reduced by 33%. This would be more in compliance with the Provincial Policy Statements (PPS) 2005 and Official Plan policies related to both environmental issues and intensification than would the otherwise permitted parking lots. In this regard, the City of Ottawa in addition to the Town of Whitchurch-Stouffville applies a 20% reduction in parking when a DTF is present and the City of Winnipeg applies a 50% reduction.

Further, for your consideration, attached hereto are the Briefing Notes – Summary of the Air Quality Assessment of Tim Hortons Restaurants: Ontario, Canada (May 2008). These briefing notes summarize the larger study completed by RWDI Air Inc which has also been peer reviewed and accepted by Dr. Deniz Karman, PHD, P.Eng. Professor of Environmental Engineering at Carleton University in Ottawa. RWDI is a leading wind engineering consulting firm in the world also specializing in sustainable design, environmental air quality, noise, and risk services. Amongst other conclusions from this study, the primary one is that there would be no air quality benefit to the public from eliminating drive-throughs. Further, as illustrated within the charts on pages 2 and 3 of the Briefing Notes, those restaurants that relied on parking lots only without a DTF to service customers produced higher overall emissions than sites with the DTF option. This difference will become even more evident in 2016 when greater emission control requirements for vehicles take effect.

The Background & Options Paper prepared by the Town's consultant spends considerable time detailing comments and suggests that DTF do not comply with several policy directions of the PPS. Conversely, we note that the prohibitions of DTF proposed by the draft OPA and ZBA is actually not in accordance with the multiple provisions of the PPS. Based on the studies we are aware of, we believe that DTF are more in compliance with the PPS than the alternative, which again are restaurants and many other commercial and recreational uses that rely on parking lots only to service and accommodate its customers. We object and take exception to the reference to "Adverse Effects" as referred to in the PPS being somehow applicable to DTF as outlined on pages 7 and 9 of the Background Paper. We believe it to be a real stretch to conclude that these noted considerations of "adverse effects" applies specifically to DTF. If it did, then surely it would more so apply to any commercial parking lot, large format retail areas, and large seasonal/recreational parking lot areas that are common in the Town. Further, we have reviewed all the related comments in the Background Paper suggesting that DTF may not comply with the Town's Official Plan which we disagree with as again, anywhere a parking lot is permitted a DTF should also be permitted. The removal of the proposed DTF prohibition would be more in keeping with the PPS and other applicable policies of the Town's Official Plan relative to intensity of land use and environmental sustainability than would the alternative being larger parking lots in the same areas DTF are proposed to be prohibited. Facts and science do not support the conclusions suggested or indeed leapt to about DTF in the Background Paper prepared by the Town's consultant.

In reviewing the Background & Options Paper prepared by the Town's consultants dated June 2010, we question if this is considered the Town's "study" on this matter. The Planning Act specifically requires a municipality to complete a study of the subject of an Interim Control By-law per Section 38 of the Planning Act. In addition, there is an abundance of case law that supports the fact that to accomplish prohibitions of this kind, there is a duty upon municipalities to engage in a fulsome study of the true and substantiated issues surrounding the use. To the best of our knowledge, no such study has taken place in the Town of The Blue Mountains. We found this paper to contain many subjective and incorrect comments and not representative of the specific issues with DTF in the Town of The Blue Mountains. The paper contains a lot of information on what other municipalities have done or may have done relative to OPA policies and ZBA on drive-through facilities in which many of these

comments are not correct or up to date. In this regard, we would note that if a municipality has a current OPA based prohibition on DTF, it likely occurred several years ago and the above noted brands or the ORHMA were not aware of its passing. We have recently been actively involved with several municipalities such as Ajax, Milton, and Oakville to have existing or proposed OPA based prohibitions removed.

We noticed that the Background Paper advises that that Town consider through the OPA the adoption of Urban Design Guidelines for DTF and it notes eight specific urban design related policies that should be included. Again, we object to any form of OPA based prohibitions and therefore, we would also object to the related Urban Design Guidelines considered as part of the draft OPA.

We note with interest and we respectfully request that Town Council also note that which the Town's consultants indicate on page 18 of the Background Paper being the following: *"It should be noted that, of the municipalities surveyed, no municipality has an outright ban of all DTF. Considering this approach may not be required given the policy, zoning site plan control and urban design mechanisms available to control the location and design of these uses."* Based on their statement, why than would the Town's consultant recommend the passage of a town wide zoning by-law that completely removes all existing "as-of-right" zoning permissions for DTF? This recommendation, if supported by Town Council, can only be described as an outright prohibition. Further, again as per the case law examples provided as attached to this letter, any form or prohibition at the level of the Official Plan is not acceptable.

Having considered all material prepared to date on this matter by the Town and its consultants, including the draft OPA and two ZBA, we object to the current proposed draft OPA and two ZBA in their entirety for the reasons stated above, which also includes the draft new regulations for DTF. We respectfully request and urge Town Council to defer any further consideration of these current draft Official Plan and Zoning By-law Amendments and instruct Town staff and its consultants to meet with us and our clients together with their transportation and air quality consultants, if deemed necessary, so that we can demonstrate that DTF can locate and be designed within any area of the Town to be more in conformity with the Town's and provincial objectives and policies rather than the otherwise permitted parking lots. We suggest that these discussions focus on specific "performance standards" or tests a DTF would have to meet within limited identified areas of the Town as part of the Official Plan but not a prohibition at the level of the Official Plan. Further, discussions about zoning permissions and regulations also needs be discussed as well as a more complete draft of Urban Design Guidelines as the current referred to Urban Design related policies contained in the Background Paper and the draft OPA are not properly detailed and therefore, not acceptable at this time. Finally, it is important to note to Town Council that regardless of what advice you may be receiving, since 2005 any municipality that has passed an Official Plan based prohibition on DTF which has been appealed to the OMB, not one of those Official Plan based prohibitions has been sustained by the OMB.

Thank you for your attention to this letter and we request to be notified of any future consideration of this matter by Town Council as well as the passing of the proposed Official Plan and Zoning By-law Amendments or of the refusal of a request to amend the Official Plan and Zoning By-law on this matter.

Yours truly,
Labreche Patterson & Associates Inc.

Victor Labreche, MCIP, RPP
Senior Principal

VL/sl

Attach.

Copy: *Cindy Welsh (via e-mail: cwelsh@thebluemountains.ca)*
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Memorandum

To: Michael Polowin
Date: June 12, 2008 (updated to February 22, 2010 by Elad Gafni)
Re: Prohibition on Specific Uses in Official Plans
File Number: 01368989

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1. INTRODUCTION

You asked me to research information relating to the existing jurisprudence, particularly in Ontario, relating to attempts to prohibit specific uses of land at the level of an official plan.

2. SHORT ANSWER

Having canvassed a wide range of sources, my research leads me to the following conclusions. The notion that official plans should remain broad and flexible is rife throughout the jurisprudence. The majority of courts and tribunals endorse the view that official plans should be broad policy statements that rise above the level of detailed regulation. Further, the prohibition of specific uses within municipalities, such as drive-throughs, adult entertainment and pinball machines have overwhelmingly been achieved through mechanisms other than the official plan, such as zoning by-laws.

Despite this being the overall consensus in the current jurisprudence, the law as it currently stands, does not appear to preclude municipalities from prohibiting specific uses in their official plans. In fact I was able to locate an Ontario Municipal Board (the "Board") decision where the City of Peterborough chose to regulate adult entertainment parlours using their official plan. However, since that 1989 decision I have been unable to find any other decisions where official plans have been used in a similar capacity, and as demonstrated in some of the more recent decisions that follow, that decision is an exception rather than the norm.

3. SUMMARY OF RELEVANT JURISPRUDENCE

3.1 Contents of an Official Plan – See Tab 1

(a) *Goldlist Properties Inc v. Toronto (City)*[1]: In this case the city of Toronto adopted an official plan amendment to enact policies relating to the preservation and replenishment of rental housing, in part by restricting "the demolition of rental property and the conversion of rental units to condominiums." While defining the scope of official plan contents the court at paragraph 14 explained that the *Planning Act*[2], apart from sections 16(1)(a) and 16(2)(b), does not contain any other specific provisions limiting the contents of what can be included in the official plan. The court, at paragraph 49, dealt with the issue of what could be included:

> Section 16(1)(a) is cast in terms of the minimum requirements for an official plan, not the outside limits. It does not list heads of power or the subjects that may be addressed by the official plan. There are unquestionably limits to what a municipality may include within its official plan, but the wording and scope of s. 16(1)(a) indicate that those limits cannot be determined solely by a literal application of its terms. To determine what may be included in an official plan, as distinct from what must be included by virtue of s. 16(1)(a), reference must be had to the *Planning Act* as a whole. In this regard, it is important to bear in mind that the purpose of an official plan is to set out a framework of "goals, objectives and policies" to shape and discipline specific operative planning decisions. *An official plan rises above the level of detailed regulation* and establishes the broad principles that are to govern the municipality's land use planning generally.[3]

Ultimately, the court held that the municipality had authority to limit/control the conversion or demolition of rental housing. This decision was based on the overall purpose of the *Planning Act* taken together with a specific legislative directive, the Provincial Policy Statement (1997), indicating that the municipality should provide for a full range of housing.[4] The court stated that they were fortified in their decision by recent jurisprudence supporting the idea that decision-makers should avoid narrow and technical readings of municipal power.[5]

Paragraph 49 of the *Goldlist* decision, referred to above, is cited in the recent case of *Toronto (City) v. R & G Realty Management Inc.* for the proposition that "an Official Plan does not have the force of a statute"; rather, an Official Plan "is a 'recommendation, or statement of intention only, which may or may not be implemented by the municipality by the enactment of appropriate zoning by-laws'".[6] In further support of the proposition that an Official Plan does not have the force of a statute, the Court in *R & G Realty Management* cites the decision in *Woodglen & Co. Ltd. v. City of North York et al.*, where it was held that "an official plan and amendments thereto are not effective in themselves to regulate land use" and that "an official plan is a recommendation, or statement of intention only, which may or may not be implemented by the

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[1] [2003] O.J. No. 3931, D.L.R. (4 th) 298, CanLII 50084 (Ont. C.A.) [*Goldlist* cited to CanLII].
[2] R.S.O. 1990, c. P.13.
[3] *Supra* note 1, at para. 49. [emphasis added].
[4] *Ibid.* at para. 55.
[5] *Ibid.* at para. 57.
[6] *Toronto (City) v. R & G Realty Management Inc.*, [2009] O.J. No. 3358 at para. 25 (Ont. Sup. Ct. J.).

municipality by the enactment of appropriate zoning by-laws".[7] Neither case, however, deals with the issue of what may or may not be properly included in an Official Plan.

(b) *Frontenac-Lennox & Addington (County) Roman Catholic Separate School Board v. Kingston (City)*[8]: In this case there was an inconsistency between the city's new comprehensive official plan and a zoning by-law. While the zoning by-law permitted schools in industrial zones, the official plan prohibited it. As the Board commented at paragraph 5, "[t]he hitch is that the official plan forbids a school. However, the plan is a statement of objectives and policy, designed to guide the City's land use decision-makers. Normally, land use rights depend on the zoning, not the official plan."[9] In a separate decision discussing the same issues arising from the same fact situation, the court determined that the official plan did not in fact prohibit schools in industrial zones, but rather stood for the proposition that they could be prohibited.[10]

(c) *Steven Polon Ltd. v. Metropolitan Toronto (Municipality) Licensing Commission*[11]: In this case the Court considered an appeal from the decision of the Metropolitan Licensing Commission refusing to issue to the applicant a salvage yard licence for land situate in the Township of Scarborough. In refusing to issue the licence to the applicant, the Commission based its decision on the Township's Official Plan, which designated the land at issue as agricultural and therefore did not permit the use of the land as a salvage yard or scrap yard, despite the fact that the Official Plan had not yet been implemented by a zoning by-law. The Court held that where an Official Plan has been enacted by a municipality, but no zoning by-law has yet implemented the plan, the official plan is simply a statement of intention and is not an effective instrument to restrict land use:

> As a result of a perusal of ss. 10 to 20 of the *Planning Act*, R.S.O. 1960, c. 296, I am of the opinion that the Official Plan adopted by the respondent municipality is little more than a statement of intention of what, at the moment, the municipality plans to do in the future. Provisions for the amendment of an official plan make it clear that the municipality is not bound to carry out that intention and may from time to time as circumstances develop make such changes as appear desirable. The Official Plan is not therefore an effective instrument restricting land use.[12]

3.2 <u>Policy Versus Regulation</u> – See Tab 2

(a) *Re Whitchurch-Stouffville (Town) Interim Official Plan*[13]: Here, the town's official plan had provisions requiring both a 200 ft. set-back and a minimum 500 ft. lot frontage along a highway. The Board held that the sections of the official plan were regulatory in nature rather than a policy statement and ruled that such matters should be confined to by-laws: "The board is

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[7] *Woodglen & Co. Ltd. v. City of North York et al.* (1984), 47 O.R. (2d) 614 at 617 (Div. Ct.).
[8] *Frontenac-Lennox & Addington (County) Roman Catholic Separate School Board v. Kingston (City)* (1994), 25 M.P.L.R. (2d) 110 at para. 5 (O.M.B.).
[9] *Ibid.*
[10] *Frontenac-Lennox & Addington (County) Roman Catholic Separate School Board v. Kingston (City)* (1994), 25 M.L.P.R. (2d) 102 (Ont. C.J.).
[11] *Steven Polon Ltd. v. Metropolitan Toronto (Municipality) Licensing Commission*, [1961] O.R. 810, 29 D.L.R. (2d) 620, CarswellOnt 147 (Ont. H.C.).
[12] *Ibid.* at para. 8.
[13] (1983), 16 O.M.B.R. 280, CarswellOnt 1914 (O.M.B.) [*Whitchurch* cited to CarswellOnt].

disturbed that the mention of measurements relative to set-backs is really a regulatory process having no place in the official plan"; and later, "[o]nce again this is regulatory rather than a policy statement and should be confined to the by-law. The board agrees with the concept but not the regulatory approach used."[14]

(b) *Re Brampton Planning Area Official Plan Amendment 75*[15]: The City of Brampton proposed to remove provisions from their official plan regarding detailed traffic control. Here the Board agreed with the city planner who expressed the opinion that "traffic regulatory provisions and particularly in such detail, have no place in an official plan and that they also encumber council's jurisdiction under the *Municipal Act* to properly exercise their authority."[16]

3.3 <u>Broad & Flexible Approach</u> – See Tab 3

(a) *Re Bradford & West Gwillimbury Planning Area Official Plan Amendments 13, 13A & 13B*[17]: Here, the town proposed several amendments to their official plan. The Board agreed with the opinion of planner Donald Given, in that there should be flexibility in an official plan to eliminate the necessity of amendments.[18]

(b) *Cadillac Development Corp. v. Toronto (City)*[19]: Here, the court recognised the necessity in having a flexible official plan to avoid the need to amend official plans. As stated by Henry, J. "a council that wishes to permit development that conflicts with the policy of the plan is restrained and must first have recourse to the cumbersome machinery for amending the plan and the meticulous scrutiny it entails."[20]

(c) *Halmir Investments Ltd. v. City of North York*[21]: This decision is illustrative of the problems faced by municipalities when official plans stray beyond policy. Here the applicant was seeking a specific text change in the district plan to permit the development of an apartment building as the plan only permitted a maximum density of 40 units to the acre. While the Board ultimately accepted the specific amendment to the official plan, to allow the requested 51 units per acre, the Board voiced its distaste for site specific amendments to official plans. As the Board stated, "this official plan could achieve the same result for the site in question by a more general statement of policy [...] This plan does not contain what several others do have incorporated within them, namely that the plan is not intended as an instrument to restrict the use of land in the manner of a zoning by-law."[22]

The notion that official plans should remain flexible is rife throughout the jurisprudence dealing with the issue. That said, it is not uncommon for the Ontario Municipal Board to approve amendments that appear restrictive.

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[14] *Ibid.*
[15] (1982), 14 O.M.B.R. 482, CarswellOnt 1966 (O.M.B.) [*Brampton* cited to Carswell Ont].
[16] *Ibid.* at para. 5.
[17] (1979), 10 O.M.B.R. 257, CarswellOnt 1669 (O.M.B.) [*Bradford* cited to CarswellOnt].
[18] *Ibid.* at para. 45.
[19] (1973) 1 O.R. (2d) 20, 39 D.L.R. (3d) 188, CarswellOnt 271 (Ont. S.C.) [*Cadillac* cited to CarswellOnt].
[20] *Ibid.* at para. 25.
[21] (1980) 10 M.P.L.R. 241 (O.M.B.).
[22] *Ibid.* at 246.

(d) *Elia Corp. v. Mississauga (City)*[23]: Here, the city contended that the amendments to the official plan should reflect all of the elements contained in the zoning by-law, including the numerical standards, in order to ensure there would be no potential misunderstanding in the future. Despite the appellant's argument that flexibility should be maintained in an official plan which by definition is a broad policy document, the Board nonetheless proceeded to accept the city's position and approve the amendments with all the elements contained in the proposed zoning by-law.

The approach taken in *Elia* seems counter to the direction provided by the Supreme Court of Canada in *Subilomar Properties v. Cloverdale.*[24] In *Subilomar*, the court stated "[t]he purpose of an official plan has been said on many occasions to be an outline of a scheme or proposal for controlling the use of lands within the municipality."[25] The court then went on to site *Campbell v. Regina (City)*,[26] where Johnson J. adopted the position taken by the city that, "the scheme is merely a general statement of future intentions. It contends that the scheme does not and is not intended to impose a straight jacket on future development."[27]

(e) *Bele Himmell Investments Ltd. v. City of Mississauga et al.*[28]: At issue in *Bele* was whether the Board erred in law or jurisdiction in deciding that a zoning by-law conformed to the official plan of the municipality. This case is often cited as providing direction on how official plans should be interpreted. At paragraph 22 the court explained that:

> Official Plans are not statutes and should not be construed as such [...] Official Plans set out the present policy of the community concerning its future physical, social and economic development [...] It is the function of the Board in the course of considering whether to approve a by-law to make sure that is conforms with the Official Plan. In doing so, the Board should give to the Official Plan a broad liberal interpretation with a view to furthering its policy objectives.[29]

3.4 <u>Adult Entertainment Prohibited in Official Plan</u> - See Tab 4

Having canvassed a wide range of sources, municipalities often regulate adult entertainment parlours through by-laws. That said, I have been able to locate an Ontario Municipal Board decision where the City of Peterborough chose to regulate adult entertainment parlours using their official plan. In *Re Peterborough (City) Official Plan Amendment 56*[30] the city approached a planning consultant who was already involved in a comprehensive official plan review and asked the planner to develop criteria for the regulation of adult entertainment parlours in Peterborough. Ultimately the policy was adopted in the official plan which provides very limited locations for adult entertainment parlours in the city.[31] The amendment also provided for site-

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[23] 2005 WL 2596774, CarswellOnt 6205 (O.M.B.) [*Elia* cited to CarswellOnt].
[24] [1973] S.C.R. 596 [*Subilomar*].
[25] *Ibid.* at 606.
[26] (1966), 58 D.L.R. (2d) 259 (Sask. Q.B.).
[27] *Ibid.* at 263.
[28] (1982), 13 O.M.B.R. 17, CarswellOnt 1946 (Ont. Div. Ct.) [*Bele* cited to CarswellOnt].
[29] *Ibid.* at para. 22.
[30] 23 O.M.B.R. 57, 1989 CarswellOnt 3512 (O.M.B.) [*Peterborough* cited to CarswellOnt].
[31] *Ibid.* at para. 7.

specific amendments to the zoning by-law to review any development proposal of an adult entertainment parlour in the municipality.

3.5 Regulation of Drive-Throughs – See Tab 5

(a) *TDL Group Ltd. v. City of Ottawa*[32]: At issue in this decision was the 2003 City of Ottawa official plans, which prohibited the establishment of new drive-through facilities in certain areas. TDL opposed the prohibition on the ground that there was no planning justification for the city adopting such a prohibition. The city, on the other hand, justified the prohibition as a means of protecting and enhancing the pedestrian environment in the given areas. In coming to their decision the Board took note of a decision rendered by the Board in 2004, commonly referred to as the "Toronto Drive-Through" case.[33] Further, the Board was accepting of the evidence that "urban drive-throughs" can be designed to suit the unique characteristics of specific locations, and took note of the City of Ottawa's Urban Design Guidelines for Drive-Throughs released in May of 2006. Ultimately, the Board ruled that there was no proper basis to support the prohibition, and that such matters should be dealt with in zoning by-laws. The Board's position was summarized as follows:

> The Board agrees that the policy as it exists gives no consideration to the possible effect on the pedestrian environment through design for the unique characteristics of specific locations and that there are a number of ways to develop drive-through facilities on "Traditional Mainstreets", while protecting and enhancing the pedestrian environment. The evidence proffered by the appellant shows that "drive-through facilities" in appropriate circumstances, can be designed to have minimal impact on traffic and the pedestrian environment. [...] The proper approach for controlling [drive-through facilities] is the one adopted by the City of Toronto, which prohibits these facilities through its zoning by-law and not in its official plan. Official plans to not need to be prescriptive like zoning by-laws.[34]

This case is consistent with the view expressed in *Goldlist* that official plans rise above the level of detailed regulation. Apart from this decision, and the decision mentioned therein, there does not appear to exist any other cases dealing with the prohibition of drive-throughs in Ontario.

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[32] Decision/Order No. 2649, issued September 21, 2006 (O.M.B).
[33] TDL Group Ltc. v. City of Toronto, Decision/Order No. 0154, issued January 23, 2004 (O.M.B).
[34] *Ibid.* at 19.

Briefing Note - Summary of the Air Quality Assessment of Tim Hortons Restaurants: Ontario, Canada (May 2008)

Conducted By RWDI AIR Inc Consulting Engineers & Scientists
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PEER REVIEWER: DR. DENIZ KARMAN, PHD, P.ENG, PROFESSOR OF ENVIRONMENTAL ENGINEERING, CARLETON UNIVERSITY

Purpose:

RWDI AIR Inc. (RWDI) was retained by the TDL Group Corp. to conduct an air quality study of vehicles using their facilities. The TDL Group is interested in having sound technical information on vehicle emissions at its facilities that have a drive-through component. The TDL Group also requested comparing these vehicles emissions to other common sources of air pollution to assist the public with an easily understood comparison when discussing vehicle emissions at drive-throughs.

In addition, the TDL Group wanted to know how the drive-through emissions will change in the future as aging models of automobiles are gradually phased out and replaced by newer models with lower emissions. Finally, the TDL Group wants information on how the emissions at drive-through facilities affect the local air quality around those facilities.

Methodology

Based on actual traffic surveys taken at peak times in four typical stores, an emission inventory was developed for two scenarios, Scenario 1: a conventional store with both drive-through and in-store operations and Scenario 2: a store with in-store service only (no drive-through.) Typical patterns or modes of operation for vehicles using the drive through and the parking lot were developed from these and other observations

This study examined the main pollutants of concern for motor vehicles, which are as follows:

- Smog pollutants – oxides of nitrogen (NO_X), hydrocarbons (HC), sulphur dioxide (SO_2) and particulate matter (PM);
- Local pollutants – carbon monoxide (CO); and
- Greenhouse gases – carbon dioxide (CO_2).

Emission models produced by the U.S. Environmental Protection Agency and other accepted methodologies were used to estimate emissions. Tedesco Engineering provided detailed traffic survey data that was used to calculate site-specific emissions.

The emission inventory for the drive-through portion of the facility was compared to "everyday" emission sources (i.e. lawn mowers, snow blowers, etc.). Dispersion modelling was conducted for a drive-through facility to predict maximum pollutant concentrations in the areas adjacent to a Tim Hortons store and compare them to provincial standards set out by the Ontario Ministry of the Environment (MOE).

Further technical details of the methodology can be found in the main text of the report. The method and findings were subjected to peer review by Dr. Deniz Karman of Carleton University http://www.carleton.ca/engineeringdesign/research/profiles/personal_bio.php?id=64.

Briefing Note - Summary of the Air Quality Assessment of Tim Hortons Restaurants: Ontario, Canada (May 2008)

Findings

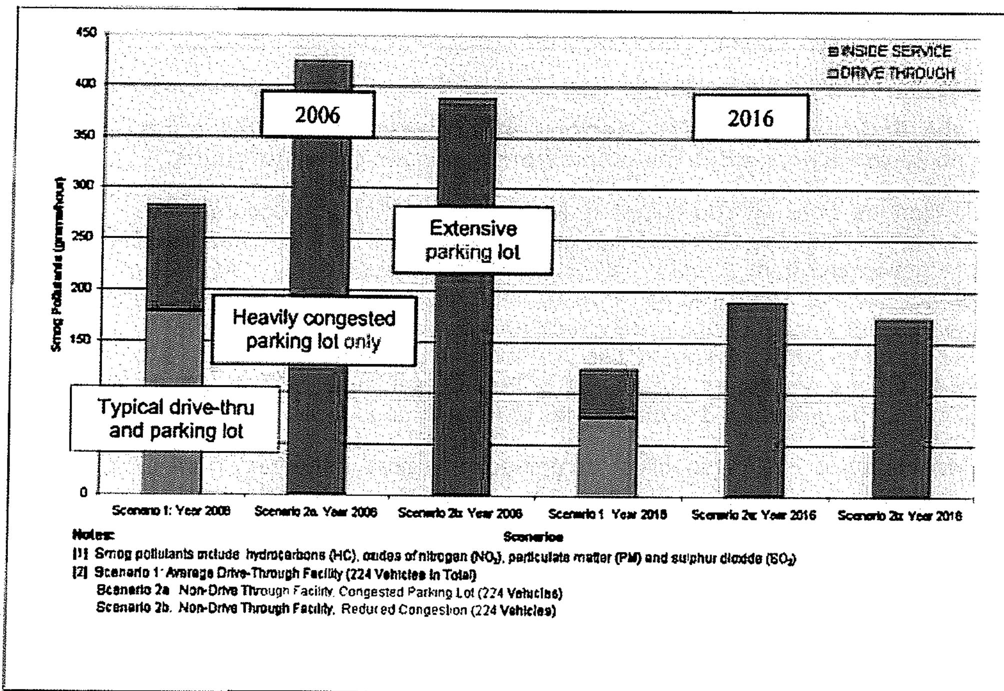
The total number of vehicles that use a conventional Tim Hortons facility during the morning peak hour was averaged to be 224; for vehicles using the drive-through, the average time on site ranged from 3 to about 4.5 minutes and for vehicles using the parking lot, the average time on site is about double, ranging from 7 to 8 minutes.

Modes of operation that produce emissions were determined to be:

- Moving into position in the queue lane or moving into a parking space (this mode of operation is referred to as "crawling");
- Idling while waiting for a parking space or warming up a vehicle in a parking space or waiting in the queue lane of the drive-through
- Pulling into and out-of a parking space;
- Starting up the engine in a parking space before exiting (referred to as a "start-up");
- Moving from the service window or from a parking space to the curb while exiting the site ("additional crawling"); and,
- Idling at the curb while waiting to get on the street.

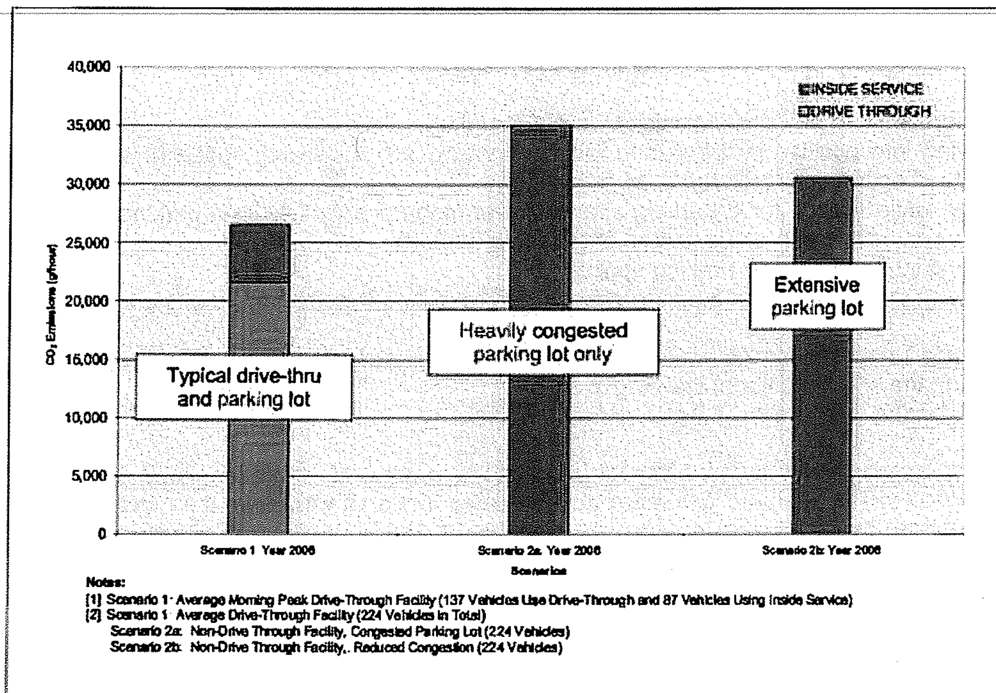
Applying the standard vehicle emission data to these modes of operation for the average number of Tim Hortons customers at peak times in stores with drive throughs and without (using two scenarios in which the parking lot was approximately doubled and tripled in size, 2a and 2b respectively) produced the following emissions results during a peak hour of operation:

Figure i: Smog Pollutant Emissions for Drive-Through Restaurants (Scenario 1) and Non-Drive-Through Restaurants (Scenarios 2a and b)



Briefing Note - Summary of the Air Quality Assessment of Tim Hortons Restaurants: Ontario, Canada (May 2008)

Figure ii: CO_2 Emissions for Drive-Through Restaurants (Scenario 1) and Non-Drive-Through Restaurants (Scenarios 2a and b)



Notes:
[1] Scenario 1 - Average Morning Peak Drive-Through Facility (137 Vehicles Use Drive-Through and 87 Vehicles Using Inside Service)
[2] Scenario 1 - Average Drive-Through Facility (224 Vehicles in Total)
Scenario 2a: Non-Drive Through Facility, Congested Parking Lot (224 Vehicles)
Scenario 2b: Non-Drive Through Facility,. Reduced Congestion (224 Vehicles)

Conclusions

- **Overall, the findings for the Tim Hortons stores examined in this study indicate no air quality benefit to the public from eliminating drive-throughs.**
- For a Tim Hortons store with no drive-through, the congestion that occurs in the parking lot, together with the start-up emissions and emissions from the extra travel distance to get to and from a space, all contribute to produce somewhat higher emissions per vehicle compared to a store that has a drive-through, this is particularly true in the case of smog pollutants and carbon monoxide (about 40 to 70% higher for those pollutants) but is also true for greenhouse gases (about 10 to 30% higher). These results are considered to be representative for Tim Hortons stores but cannot be generalized to other types of drive-through facilities.
- To put drive-throughs into perspective, combined emissions generated from all vehicles using a drive-through facility during a peak-hour of operation are relatively small in relation to other common emission sources: smog pollutant emissions from all vehicles are comparable to a single chain saw operating for one hour; CO_2 emissions are comparable to a single bus operating for one hour; emissions from all vehicles using a store with a drive-through during the peak hour are less than one fifth of the emissions at an urban intersection; and emissions of smog pollutants and greenhouse gases from a single vehicle using a drive-through are less than 10% and 5% respectively of a typical 30-minute morning commute.

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- A comparison of Year 2006 and Year 2016 modelling indicates that predicted trends in fleet-wide emissions will result in reduced impacts from smog pollutants and carbon monoxide in the future.
- Dispersion modeling shows that 1-hour off-site concentrations of CO and NO_X are below the provincial standards in 2006 and even further below in 2016. Therefore, based on a typical site layout, there are no adverse air effects predicted for land uses adjacent to the drive-through facility.

Peer Review

Dr. Deniz Karman, PhD, P.Eng, received a Ph.D. in Chemical Engineering from the University of New Brunswick and is now a professor of environmental engineering at Carleton University in Ottawa. His research interests include: motor vehicle emissions and air quality in microenvironments; air pollution sources, control methods and dispersion modelling; and greenhouse gas emissions from industrial sources.

In addition to pursuing his own research interests, Doctor Karman has acted as a consultant on projects involving motor vehicle emissions monitoring, alternative fuel effects on motor vehicle emissions, dispersion modelling for roadways and street canyons, and receptor modelling source apportionment for volatile organic and particulate matter. http://www.carleton.ca/engineeringdesign/research/profiles/personal_bio.php?id=64

After reviewing the RWDI study Dr. Karman concluded

> **The RWDI study is a detailed quantitative attempt to estimate emissions from different vehicle patterns around *Tim Hortons* facilities with and without drive-through service. It has applied appropriate methodologies for quantifying these emissions in typical cases, has put the results obtained in the context of other emission sources, and estimated ambient concentrations around a typical facility. It provides a sound basis for estimating the effect of the two types of *Tim Hortons* facilities.**

Project Director

Mike Lepage, M.Sc., CCM, Principal / Project Director, joined RWDI in 1981 and became an Associate of the firm in 1988. As a Project Director, he provides overall direction on air quality and meteorological projects, ensuring that a high level of service is provided and, at the same time, RWDI's interests are preserved on all projects. Mike also oversees RWDI regional atmospheric modeling group, which is involved in high-end numerical modeling of regional air pollutants such as ground-level ozone and fine particulate matter. In recent years he has been extensively involved in regional modeling of meteorology and atmospheric chemistry to investigate large scale smog events, using models such MM5, Models-3/CMAQ, SAQM, CALGRID and CALPUFF.

RWDI

RWDI is the leading wind engineering consulting services firm in the world. With 400+ staff and offices in five countries, the company offers a complete range of wind engineering, sustainable design, environmental air quality, noise and risk services.