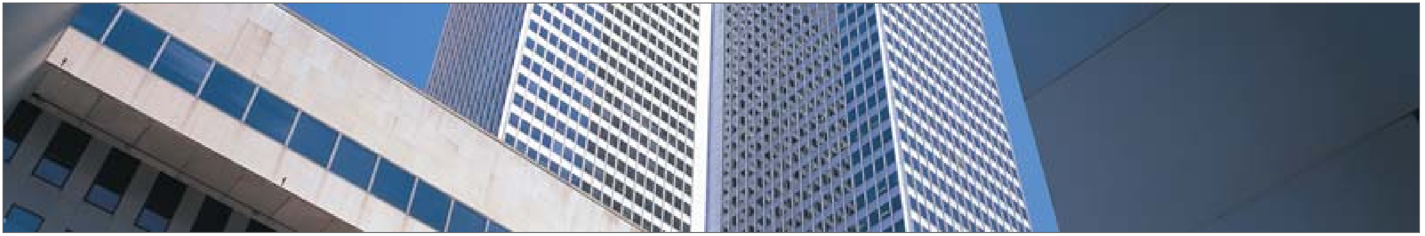
Official, but illegal: Are Official Plans being used in a manner that is a "bridge too far?"

Michael Polowin and Graydon Ebert



Across Ontario, there have been two complementary trends in planning and development law. First, a greater engagement of the public in matters of development, most often concerned about development, including greater height and density in existing neighbourhoods; and second, municipalities, concerned about the first trend, seeking to preclude debate on such matters by placing strict regulation of development and prohibition of uses in Official Plans.

This article, previously published in The Digest of Municipal and Planning Law ((2011) 5 D.M.P.L. (2d), August 2011, Issue 8), argues that notwithstanding the prevalence of such a trend, such measures are beyond the legal authority of municipalities, and offers a path to challenge such measures.

INTRODUCTION

An official plan is a useful and necessary tool used by municipalities to plan for their future development and growth. However, as currently used, many, if not most official plans across Ontario contain elements that are not consistent with the law, either in the form of decided case law, or on a plain reading of the *Planning Act*.[1]

Many official plans across Ontario attempt to rigidly prescribe performance standards, prohibit certain kinds of uses, or otherwise attempt to specifically regulate use or building form. The practice appears to be a reaction to the continuing clash between a more activist population and the development industry. One planner justified the use of official plans in this way to the author on the grounds of attempting to control the requests for relief by the development industry. Regardless of the reason for or breadth of such a practice, it is not in compliance with the statute and the case law, neither of which allow such content in an official plan. As such, the attempted use of such regulation or prohibition may well be “a bridge too far”.

There is a wealth of jurisprudence which suggests that official plans are intended to be broad and flexible policy statements that should and do not have the effect of a statute. Official plans are not intended to be used to prohibit or regulate specific land uses in detail. Rather, these should be implemented through zoning by-laws. Despite this consensus in the current jurisprudence, municipalities appear to more and more be using official plans in a manner not intended or indeed permitted. Indeed, in the face of rancorous public debate over development issues, more and more municipal staff and councils are proposing the use of official plans to prohibit specific uses, or regulate performance standards in a manner approaching the methods of a zoning by-law.

The jurisprudence also suggests that since official plans are intended to be broad and flexible policy documents with an eye towards long-term planning, they should avoid being too detailed or specific to allow for municipal development to freely evolve without the constant need for official plan amendments. The Ontario Municipal Board (the “Board”) has approved detailed site-specific amendments to official plans to allow for changes in development in the past, but has voiced its concerns regarding this planning practice.

Finally, there is case law which suggests that when power or authority is explicitly granted in one instance in a statute, the lack of the same expressly granted power in another instance will usually be construed as though the legislature did not intend for the body to have the power in the latter instance, by virtue of the *expressio unius est exclusio alterius* or implied exclusion rule. In this context, the fact that municipalities are expressly given the power to pass zoning by-laws under s. 34 of the *Planning Act* which are intended to “regulate” or “prohibit” suggests that municipalities were not intended to “regulate” or “prohibit” within an official plan because under s. 16 of the *Planning Act*, municipalities are not expressly given the power to “regulate” or “prohibit”.[2] It is the authors’ view that it is likely that the implied exclusion rule would be applied in this context.

SUMMARY OF RELEVANT JURISPRUDENCE

1. Content of an Official Plan

Goldlist Properties Inc v. Toronto (City)[3]

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*, apart from s. 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. *[emphasis added]*

2. Policy Versus Regulation

Goldlist Properties Inc v. Toronto (City) spoke to the fact that an official plan is intended to go beyond detailed regulation and establish broad planning principles that govern land use generally. This point, that official plans are not intended to impose specific planning guidelines, but rather zoning by-laws are the appropriate vehicle for such regulation, is canvassed in the following cases.

Steven Polon Ltd. v. Toronto (Metropolitan) Licensing Commission [4]

The court considered an appeal from the decision of the Metropolitan Licensing Commission refusing to issue a salvage yard licence for land 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, at paragraph 8, 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.

Cadillac Development Corp. v. Toronto (City)[5]

The court addressed, at paragraph 24, the role of an official plan as a policy document:

> [T]he Official Plan therefore, as it is in effect from time to time, represents a policy or program having legislative effect, governing the area to which it applies. It is clear from the scheme of the Act that the Official Plan is not immutable (s. 17) and does not have effect to implement the policy outlined by it. Implementation is to be effected by by-laws of the Municipal Council that conform to the policy specified in the plan.

Hamilton Harbour Commissioners v. Hamilton (City)[6]

The court addressed the effect of an official plan amendment in relation to a zoning by-law. Griffiths J. states, at paragraph 95:

> [I]n any event, unless and until official plan amendment 281 is implemented by a zoning by-law, which purports to direct, regulate or prohibit uses of the lands (or water) in the open water area, there is no potential conflict whatsoever. The official plan amendment has in itself no binding effect either on the Commissioners or on other land owners in the harbour.

Southwold (Township) v. Caplice[7]

Anderson J. discusses the use of an official plan to prohibit specific uses of land at paragraph 4:

> An official plan is not an effective instrument restricting the use of land. That conclusion is implicit in the series of cases dealing with the adjournment of applications for mandamus, where the issue of a building permit was resisted on the ground that the municipality was proceeding to the enactment of a zoning by-law which would prohibit the use for which the permit was sought. In those cases if the municipality could demonstrate that it had shown a *bona fide* intention to effect such a zoning before the application for building permit was made, it was deemed entitled to have the application for mandamus adjourned until the necessary processes to the passage and approval of the By-Law had been completed. Evidence of such a *bona fide* intention was found in those cases in the existence of an official plan to which the proposed zoning would conform. *Had the official plan been effective to restrict the land use it would in itself have been an answer to the application for a building permit. [emphasis added]*

Whitchurch-Stouffville (Town) Interim Official Plan, Re[8]

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 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."

Woodglen & Co. v. North York (City)[9]

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 municipality by the enactment of appropriate zoning by-laws".[10]

Frontenac-Lennox & Addington (County) Roman Catholic Separate School Board v. Kingston (City)[11]

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."

Polla v. Toronto (City) Chief Building Official[12]

The decision touches on the city's use of an official plan to regulate the land. Molloy, J. states at paragraph 16:

> It is abundantly clear that the conditions imposed by the City are directed towards maintaining the natural environment of the ravine. This objective may well be, and indeed probably is, consistent with the policy expressed in the Official Plan. However, an Official Plan is not law. It is merely a statement of intention, which may or may not be implemented by the municipality by the enactment of appropriate by-laws. Until such by-laws are passed, the Official Plan cannot be used by the municipality to regulate land use … Therefore, the mere fact that protecting the natural state of the ravine is consistent with the Official Plan does not create jurisdiction in the City to protect the ravine through the site plan approval process.

TDL Group Ltd. v. Ottawa (City)[13]

The 2003 City of Ottawa Official Plan prohibited the establishment of new drive-through facilities in certain areas. 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 at paragraph 19:

> 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 do not need to be prescriptive like zoning by-laws.

R & G Realty Management Inc. v. North York (City)[14]

The above paragraph in *Goldlist* is cited for the proposition that "an official plan does not have the force of a statute". Rather, in *R & G Realty Management Inc. v. North York (City)* the court states, at paragraph 25 that 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'".

Oakville (Town), Re[15]

The most recent statement regarding the use of an official plan to prohibit specific uses is contained in *Oakville (Town), Re*. While S.J. Stefanko states that it is not his role to rule on the merits of the argument that official plans should not prohibit specific uses, he does point out, at paragraph 16, that there "appears to be jurisprudence" which suggests as such. He cites the paragraphs quoted above from *Goldlist* and *TDL Group v. Ottawa (City)*.

These cases illustrate a consensus in the jurisprudence that official plans are intended to be broad documents of municipal planning policy, but are not intended to regulate specific land uses or set out specific performance standards. Zoning by-laws are the proper municipal tool for such, and regulation and policies in official plans are of no effect unless implemented by a zoning by-law. This consensus is so strong, that some decisions have considered the point to be trite law.

In *Csele v. Pelham (Town)*, Fleury, D.C.J. states that "[I] think it is trite law to say that Official Plans are basically an outline of long-term objectives proposed by a municipality and certainly do not take any legal significance until they have actually been implemented by the passage of appropriate zoning by-laws."[16] Also, in *Aon Inc. v. Peterborough (City)*, Howden, J. states that "[I]t is of course, trite law that an Official Plan simply does not 'prohibit' uses; that is the function of the zoning by-law."[17]

Being the exception to prove the rule, there is a single Board decision approving of the City of Peterborough's policy of regulating adult entertainment parlours using its official plan. In *Peterborough (City) Official Plan Amendment 56, Re*[18] the city asked the planner

undertaking its official plan review to develop criteria for the regulation of adult entertainment parlours in Peterborough. The policy was adopted in the official plan which provided very limited locations for adult entertainment parlours in the city. Ultimately, the Board was satisfied with the official plan amendment, despite its prohibition of a specific land use. The Board held, at paragraph 24, that the amendment:

> [P]rovides guidelines and policies on what is a very difficult matter in this municipality and in other municipalities as well. Instead of pushing the issue away until it explodes as municipalities sometimes do with controversial land use matters, the city has in the past several months taken a constructive path to find a solution that may not please everyone but which attempts to deal fairly between property owners, residents, business operators, adult entertainment parlours, and the persons who wish to use those facilities. There is a balance sought here between the rights of the public, the public interest and the rights of the individual. The board believes that has been fairly struck.

There was no discussion in this case of whether, regardless of the efficacy and suitability of the policy, it should have been implemented by a zoning by-law, rather than at the official plan level. For this reason and because of the strength of the consensus in the above case law it is likely that this case is an outlier and official plans are not the proper vehicles for prohibiting or regulating specific land uses and performance standards.

3. Broad & Flexible Approach

There is substantial jurisprudence which suggests that official plans are intended to be broad policy documents which should be general in nature and flexible in detail. They should provide a stable approach to municipal growth, while not encumbering future development.

Toronto (City) Central Area Official Plan, Re[19]

The Ontario Municipal Board, in discussing a proposed official plan amendment, at paragraph 110, accepted the expert evidence of planners who suggested that an official plan "should have as elements, stability and reliability; should be firm in principle with the detail flexible; should provide for continuity and reflect reality. It should also be a long term document".

Hamilton-Wentworth Planning Area Official Plan Amendment 1, Re[20]

The Ontario Municipal Board, in discussing what constitutes an official plan in Ontario, cited at paragraph 8, the paragraph above in *Toronto (City)* with approval. The Board also rejected, at paragraph 9, counsel's view that the validity of official plans could no longer be relied upon over any period of time because they had become more like a zoning by-law and required amendment in any instance of substantial rezoning.

Oakville Planning Area Official Plan Amendments 28, 31 and 32, Re[21]

The Ontario Municipal Board accepted evidence from several experts, at paragraph 27, that the purpose of an official plan was "to provide a guide to future orderly development by setting out the municipality's intentions and commitments to future development of a certain type at a certain place at a certain time." Further, an official plan should be "something like a constitution—firm in principle but flexible in detail. It follows therefore they should not be changed lightly or without good and sufficient reason."

North York Planning Area Official Plan Amendment D-11-101, Re[22]

In rejecting amendments to an official plan and its implementing zoning by-law to provide for hotels and open-air shopping areas in the downtown area, the Ontario Municipal Board was concerned with the piecemeal approach the municipality was taking to its official plan. The Board states, at paragraph 12:

> [T]he city has lost sight of its original official plan policies that create a hard boundary between the core uses and the stable residential uses surrounding. The concern of the board is that by introducing piecemeal amendments that disrupt the stability of the neighbouring residential area, the city has lost sight of the need to undertake a comprehensive review of the immediate area that will surround and may become a part of this vibrant city centre that it hopes to achieve.

Bradford & West Gwillimbury Planning Area Official Plan Amendments 13, 13A & 13B, Re[23]

The Town proposed several amendments to its official plan. The Ontario Municipal Board agreed, at paragraph 45, with the opinion of an expert planner that there should be flexibility in an official plan to eliminate the necessity of amendments.

Brampton Planning Area Official Plan Amendment 75, Re[24]

The City of Brampton proposed to remove provisions from their official plan regarding detailed traffic control. The Ontario Municipal Board agreed, at paragraph 5, 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*[25] to properly exercise their authority."

In *Cadillac*, cited in the previous section, the court recognized the necessity of having a flexible official plan to avoid the need for amendments. 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."[26]

Halmir Investments Ltd. v. North York (City)[27]

The applicant was seeking a specific text change in the district plan to permit the development of an apartment building as it only permitted a maximum density of 40 units/acre. While the Ontario Municipal Board ultimately accepted the specific amendment to the official plan, to allow the requested 51 units/acre, the Board voiced its distaste for site specific amendments to official plans. As the Board states, at paragraph 246, "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."

Bele Himmell Investments Ltd. v. Mississauga (City)[28]

At issue in *Bele* was whether the Ontario Municipal 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 it 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.

The notion that official plans should remain flexible runs through the jurisprudence. That said, it is not uncommon for the Board to approve amendments that appear restrictive:

Georgina Official Plan Amendment 10, Re [29]

The Ontario Municipal Board approved three official plan amendments which would facilitate the development of a residential retirement community because it felt that addition of the area to the plan had nothing to do with the other persons in the plan except to improve the economic base to help pay for a new sanitary system and to improve the social welfare of existing residents.[30] While the Board did approve these amendments, it did make note of the fact that "an official plan must contain elements of stability and reliability so that property owners might rely on the continuance of the plan."

Elia Corp. v. Mississauga (City)[31]

The city contended that 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 Ontario Municipal 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*.[32] In *Subilomar*, the court stated, at page 606, "[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." The court then went on to site *Campbell v. Regina (City)*,[33] 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."

It is important to note two specific aspects of the *Elia* decision that strongly suggest it is an outlier. First, the appellant did not object to the city's draft of the official plan amendment, they merely thought its version was superior to the city's version; second and more importantly, while the appellant argued for the flexible approach in the drafting of official plan amendments, there is no indication that it provided the Board with any of the jurisprudence referred to in this letter, nor any case law at all. Therefore, it appears that the Board decided this matter in a vacuum, and without the benefit of guiding authority. As such, it can be seen as having little persuasive authority, and in any event, the bulk of the decided law runs counter to its approach.

4. Implied Exclusion Rule

To determine a municipality's authority with respect to what it can do with its official plan, one must interpret s. 16 of the *Planning Act* which requires municipalities to adopt such plans. To guide one's interpretation of this provision, consideration should be given to the implied exclusion rule of statutory interpretation. This rule is described as follows:

> An implied exclusion argument lies whenever there is reason to believe that if the legislature had meant to include a particular thing within its legislation, it would have referred to that thing expressly. Because of this expectation, the legislature's failure to mention the thing becomes grounds for inferring that it was deliberately excluded. Although there is no express exclusion, exclusion is implied.[34]

In the context of powers conferred by legislation, this rule would suggest that if a legislature expressly conferred an administrative body, court, municipality, etc. with a specific power in one part of a piece of legislation, its failure to expressly confer that same power in another part of the legislation can be construed as implying that the legislature *did not intend to confer the power* in the latter part of legislation.

This interpretation rule becomes important in the context of understanding what the legislature intended with respect to what may or may not become part of an official plan as contrasted to a zoning by-law. The contents of an official plan are governed by s. 16(2) of the Act, while the content of zoning by-laws are set out in s. 34(1). What this rule of interpretation would suggest is that the legislature, by explicitly giving municipalities the power to "regulate" or "prohibit" specific land uses via zoning by-laws under s. 34(1), must have intended that municipalities specifically do not have the power to "regulate" or "prohibit" specific land uses via an official plan, because the legislature did not use prohibitive or regulatory language in s. 16(2).

There is an abundance of jurisprudence which has applied this rule in this way. However, it will not be absolutely applied. The court will look at the context of the situation and see if the application of this rule will lead to consequences that are absurd, unjust or incompatible with the purpose of the legislation.

Tétreault-Gadoury v. Canada (Employment & Immigration Commission)[35]

This case deals with a decision by the Board of Referees of the Employment and Immigration Commission under the *Unemployment Insurance Act, 1971*[36]. The relevant issue was whether the Board of Referees had jurisdiction to consider the constitutional validity of a section of the Act. Under previous jurisprudence, the court had held that an administrative body, if given an express power by the legislation to interpret or apply any law necessary in reaching its findings, has the power to apply the *Canadian Charter of Rights and Freedoms*. The problem was that in the Act, the Board of Referees was not expressly given this power. However, an umpire, to whom an appeal from the Board of Referees could be made, was given this express power to interpret or apply any law. The court ultimately applied the implied exclusion rule and held that by expressly giving umpires this power, the legislature must have not intended for the Board of Referees to have that power. The court states, at paragraphs 16-17:

> [T]hese two provisions provide a strong indication that the Legislature intended that the umpire have power to find provisions of the Act or its accompanying regulations inconsistent with the *Charter*. It is significant that the umpire has been expressly provided with this power, while the board of referees has not.
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> …
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> The maxim *expressio unius est exclusio alterius*, like all general principles of statutory interpretation, must be applied with caution. However, the power to interpret law is not one which the Legislature has conferred lightly upon administrative tribunals, and with good reason … It is unlikely, therefore, that the failure to provide the board of referees with a power similar to that given to the umpire was merely a legislative oversight.

Reference re National Energy Board Act (Canada) [37]

At issue were costs that could be awarded by the National Energy Board. Counsel seeking to obtain costs argued that two specific provisions in the Act which allowed for the National Energy Board to fix costs in certain situations were evidence that the National Energy Board had full discretion to award costs in all circumstances, despite no explicit provision as such, because these provisions merely limited the otherwise unfettered discretion of the National Energy Board. The court rejected this position and states, at paragraph 17:

> [T]he fact that Parliament has expressly conferred the power on the Board to award costs in specific situations, strengthens the position of those parties who argue against the Board's general jurisdiction. In my view, the maxim, *expressio unius est exclusio alterius* would apply to this situation. Since the maxim has been interpreted to mean "Express enactment shuts the door to further implication" (Craies on Statute Law (7th ed.) p. 259) I think it clear that when Parliament expressly dealt with costs in this Act in three separate sections dealing with three distinctly different factual situations, then it must have intended to limit the power to award costs only to those specific situations.

M. (T.M.) v. C. (P.)[38]

This case also deals with a power to award costs. At the time, the Civil Division of the Alberta Provincial Court had the express ability to award costs under the *Provincial Court Act*,[39] whereas the Family Division was not given the same express power. A father, whose applications for custody and access had been dismissed, appealed the decision of the trial judge who held that the court had jurisdiction to award costs. Brooker, J. allowed the appeal and held that principles of statutory interpretation supported his conclusion. He states, at paragraph 49:

> [A]pplication of the principle *expressio unius exclusio alterius* (implied exception) dictates that by expressly giving the power to award costs to the Civil Division, the Legislature's silence regarding a similar power for the Family Division should be interpreted as excluding that power.

R. v. H. (S.D.)[40]

The issue was whether a Youth Court judge had the jurisdiction to give a young offender a conditional discharge. Under the *Young Offenders Act*[41], a Youth Court judge had the explicit authority to discharge the young offender absolutely. However, there was no similar explicit provision with respect to conditional discharges. In allowing an appeal dismissing the conditional discharge, the court relied on the implied exclusion rule. The court states, at paragraph 3:

> [T]he first almost instinctive conclusion from reviewing such a detailed list of powers is to assume that any power not included must have been deliberately excluded—an almost text book application of the maxim *expressio unius est exclusio alterius*. This is particularly so when the first subsection deals specifically with an absolute discharge, so it is impossible to conclude that the question of the conditional discharge was likely to have been overlooked or was intended to be covered by implication or in some oblique or indirect fashion in a subsequent portion of that section.

As these cases illustrate, a court will often apply the implied exclusion rule such that if a legislature expressly conferred a specific power to a body in one part of a piece of legislation, its failure to expressly confer that same power in another part of the legislation can be construed as implying that the legislature did not intend to confer the power in the latter part of the legislation.

However, a court will not apply this rule slavishly. In *The Interpretation of Legislation in Canada, 3rd ed.*, the author notes, "since it is only a guide to the legislature's intent, *a contrario* reasoning [another term for a series of rules, including *expressio unius est exclusio alterius*] should certainly be set aside if other indications reveal that its consequences go against the statute's purpose, are manifestly absurd, or lead to incoherence and injustice."[42]

In this particular situation, these cases suggest that the implied exclusion rule should be applied to ss. 16(2) and 34(1) of the *Planning Act*. The legislature, by explicitly giving municipalities the power to "regulate" or "prohibit" specific land uses via zoning by-laws under s. 34(1), must have intended that municipalities not have the power to "regulate" or "prohibit" specific land uses via an official plan, because the legislature did not use the same in language in s. 16(2).

In the case of the *Planning Act* and the powers of municipalities to regulate through an official plan, the application of the implied exclusion rule is actually in accordance with the purpose of the provisions. As the cases above illustrate, official plans are intended to be broad, flexible, policy documents which outline a municipality's growth plan for the future. This plan is then implemented through a zoning by-law. As in *Goldlist*, an official plan is intended to rise above the level of detailed regulation. This concept of an official plan is supported by the application of the implied exclusion rule. If an official plan is intended to be a broad policy, then interpreting s. 16(2) to allow a municipality to "regulate" or "prohibit" specific land uses, or to prescribe specific performance standards (height, setback etc.) with an official plan goes against that intention, especially given that when the legislature wanted to give those powers to a municipality it explicitly did so in the legislation (i.e. the power to "regulate" or "prohibit" specific land uses via zoning by-laws).

An application of the implied exclusion rule to this question does not create an absurdity, or incoherence or injustice. Instead, it serves only to support what the courts and the Ontario Municipal Board have repeatedly found to be the intention of a properly drafted official plan.

CONCLUSION

There is a consensus in the jurisprudence that official plans are intended to be broad policy documents and are not to be vehicles for regulating specific land uses or imposing specific performance standards. The jurisprudence also suggests that given the intention that official plans be broad, flexible policy documents engaged in long-term planning, they should not be so detailed and specific as to restrict the evolution of municipal development and require multiple amendments to deal with each specific development issue because of their comprehensiveness of detail.

Finally, there is authority for the proposition that when a power is explicitly granted to a body in one instance in a statute, the lack of the equivalent express power in another instance should be construed as though the legislature did not intend for the body to have the power in the latter instance. This is by virtue of the implied exclusion rule of statutory interpretation.

In the context of official plans, s. 34 of the *Planning Act* expressly gives municipalities the power to "regulate" or "prohibit" specific land uses via zoning by-laws. This suggests that the legislature did not intend for municipalities to "regulate" or "prohibit" specific land uses via an official plan because s. 16 of the *Planning Act* does not use the same language but states that an official plan may contain "a description of the measures and procedures proposed to attain the objectives of the plan". This application of the implied exclusion rule is strengthened by the jurisprudence regarding the broad and flexible nature of official plans which illustrates that they are intended to be policy documents rather than regulatory in nature and should not be used to "regulate" or "prohibit".

This conclusion has wide ranging implications for municipal planning in Ontario. Municipalities that have mandated specific performance standards in their official plans, such as minimum setbacks and maximum height requirements, will need to revisit those plans to ensure that they are the broad planning policy documents intended by the legislature, rather than rigid, detail focused planning instruments.

Even more importantly, municipalities in Ontario will need to reconsider how they use official plans to regulate specific land uses, both in their current and future plans. For example, many municipalities have used, or have contemplated using, their official plan to regulate or prohibit drive-through facilities or cogeneration facilities. Some have used their official plans to limit the area in which such facilities are permitted. Other municipalities have used their official plan to impose performance standards, such as setback requirements, on land used for drive-through facilities, or impose maximum or minimum heights on buildings.

Municipalities that have used, or continue to use, their official plans to regulate or prohibit specific land uses should discontinue this planning policy approach. It is clear that the law, both the decided case law and the *Planning Act*, does not give municipalities the authority to use their official plans for this purpose, and that doing so constitutes a "bridge too far" in the use of official plans. Should they continue to do so, they will no doubt be met with opposition from interested members of the public or property owners with the law on their side.

Michael Polowin is a Partner with Gowling Lafleur Henderson LLP in Ottawa, practicing in Development and Planning Law. Mr. Polowin

advises and represents clients through the full spectrum of the development process. He has acted for some of the largest developers in Canada, and has been involved in development and planning matters throughout Ontario. Mr. Polowin has also acted on behalf of municipalities in Eastern Ontario on planning and development and public-private partnership matters.

Graydon Ebert articled with Gowling Lafleur Henderson LLP in Ottawa and was called to the bar in June, 2011. Mr. Ebert graduated in 2010 with a J.D. from the University of Western Ontario. Prior to law school, he obtained a B.A. (Highest Hons.) in Political Science from Carleton University.

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[1] R.S.O. 1990, c. P.13.

[2] *Ibid.*, s. 16(2)(a).

[3] 44 M.P.L.R. (3d) 1, [2003] O.J. No. 3931,232D.L.R. (4th) 298, CanLII 50084 (Ont. C.A.).

[4] [1961] O.R. 810, 29 D.L.R. (2d) 620, 1961 CarswellOnt 147 (Ont. H.C.).

[5] (1973), 1 O.R. (2d) 20, 39 D.L.R. (3d) 188, 1973 CarswellOnt 271 (Ont. H.C.).

[6] (1976), 6 M.P.L.R. 183, 21 O.R. (2d) 459, 1978 CarswellOnt 376 (Ont. C.A..).

[7] (1978), 8 M.P.L.R. 1, 22 O.R. (2d) 804, 1978 CarswellOnt 1255 (Ont. Div. Ct.).

[8] (1983), 16 O.M.B.R. 280, 1983 CarswellOnt 1914 (O.M.B.).

[9] (1984), 26 M.P.L.R. 40, 47 O.R. (2d) 614 (Ont. Div. Ct.).

[10] *Ibid* at 617.

[11] (1994), 25 M.P.L.R. (2d) 110 (O.M.B.).

[12] (2000), 15 M.P.L.R. (3d) 103, 2000 CarswellOnt 4291 (Ont. S.C.J.).

[13] Decision/Order No. 2649, issued September 21, 2006 (O.M.B).

[14] 63 M.P.L.R. (4th) 192, [2009] O.J. No. 3358 (Ont. Div. Ct.).

[15] (2010), 2010 CarswellOnt 7078 (O.M.B.).

[16] (1985), 29 M.P.L.R. 188, 1985 CarswellOnt 673 (Ont. Dist. Ct.).

[17] (1999), 1 M.P.L.R. (3d) 225, 1999 CarswellOnt 924 (Ont. Gen. Div.).

[18] (1989), 23 O.M.B.R. 57, 1989 CarswellOnt 3512 (O.M.B.).

[19] (1978), 5 M.P.L.R. 270, 1978 CarswellOnt 490 (O.M.B.).

[20] (1982), 13 O.M.B.R. 353, 1982 CarswellOnt 1953 (O.M.B.).

[21] (1978), 9 O.M.B.R. 412, 1978 CarswellOnt 1641 (O.M.B.).

[22] (1984), 16 O.M.B.R. 167, 1984 CarswellOnt 1781 (O.M.B.).

[23] (1979), 10 O.M.B.R. 257, 1979 CarswellOnt 1669 (O.M.B.).

[24] (1982), 14 O.M.B.R. 482, 1982 CarswellOnt 1966 (O.M.B.).

[25] R.S.O. 1990, c. M.45.

[26] *Supra,* footnote 24, at para. 25.

[27] (1980), 10 M.P.L.R. 241 (O.M.B.).

[28] (1982), 13 O.M.B.R. 17, 1982 CarswellOnt 1946 (Ont. Div. Ct.).

[29] (1987), 35 M.P.L.R. 219, 1987 CarswellOnt 603 (O.M.B.).

[30] *Ibid.* at para. 36.

[31] 2005 CarswellOnt 6205 (O.M.B.).

[32] [1973] S.C.R. 596.

[33] (1966), 58 D.L.R. (2d) 259 (Sask. Q.B.), at 263.

[34] Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham: Butterworths, 2002) at 186-187.

[35] [1991] 2 S.C.R. 22, 1991 CarswellNat 829, 1991 CarswellNat 346 (S.C.C.).

[36] S.C. 1970-71-72, c. 48.

[37] [1986] 3 F.C. 275, 1986 CarswellNat 225 (Fed. C.A.).

[38] 2002 ABQB 416, 2002 CarswellAlta 586 (Alta. Q.B.).

[39] R.S.A. 2000, c. P-31.

[40] [1989] 5 W.W.R. 350, 1989 CarswellSask 268 (Sask. C.A.).

[41] R.S.C. 1985, c. Y-1.

[42] P.A. Côté , *The Interpretation of Legislation in Canada*, *3d ed.* (Scarborough: Carswell, 2000) at 339.

Gowlings can assist landowners, businesses and others determine if Official Plans that seem to interfere with their proposed uses have exceeded a municipalities legal authority. If they do, we can help you develop an approach to getting your concerns heard by the municipality and if necessary to challenge the offending provisions before the Ontario Municipal Board or the Courts.

Please contact:

Gowlings Ottawa office:
Michael S. Polowin, Partner
613-786-0158
michael.polowin@gowlings.com

Gowlings Toronto office:
David C.K. Tang, Partner
416-862-3547
david.tang@gowlings.com

Gowlings Waterloo office:
John S. Doherty, Partner
519-575-7518
john.doherty@gowlings.com

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