ISSUE DATE:

January 21, 2013

PL110080

Ontario
Ontario Municipal Board
Commission des affaires municipales de l'Ontario

IN THE MATTER OF subsection 17(36) of the Planning Act, R.S.O. 1990, c. P.13, as amended

Appellant:	1541179 Ontario Ltd. and Lea Silvestri Investments Ltd. (jointly)
Appellant:	1589805 Ontario Inc.
Appellant:	2140065 Ontario Inc.
Appellant:	2163846 Ontario Inc. and others
Subject:	Proposed Official Plan
Municipality:	Regional Municipality of Waterloo Region
OMB Case No.:	PL110080
OMB File No.:	PL110080

APPEARANCES:

Parties	**Counsel**
Regional Municipality of Waterloo	Brian Duxbury
Activa Holdings Inc. 2140065 Ontario Inc. Stonefield Properties Corp. Northgate Land Corp. Hallman Construction Ltd. and Gatestone Development Corp.	Robert Howe and Ian Andres
Breslau Properties Ltd.	John Doherty
Mattamy Development Corporation	Denise Baker
2163846 Ontario Inc.	Gillian Tuck Kutarma
Township of Woolwich	Eileen Costello
William Gies	Susan Rogers
Madison Homes Inc.	Barry Horosko and Brendan Smith (student at law)

DECISION DELIVERED BY STEVEN STEFANKO AND JOSEPH SNIEZEK AND ORDER OF THE BOARD

INTRODUCTION

[1] Over the past number of years, the Regional Municipality of Waterloo ("Region") has been engaged in the process of finalizing a new Official Plan ("ROP") for the region which would, among other things, conform with the Growth Plan for the Greater Golden Horseshoe ("Growth Plan"). That process has been concluded and the ROP was adopted by Council for the Region ("Council" or Regional Council") on June 16, 2009 and subsequently approved by the Ministry of Municipal Affairs and Housing ("MMAH"), with modifications, on December 22, 2010.

[2] A key component of the ROP is the establishment of a land budget which meets the intensification target ("Intensification Target") set out in s. 2.2.3.1 of the Growth Plan and the density target ("Density Target") set forth in s. 2.2.7.2 ("collectively the "Growth Plan Targets"). For ease of reference the Growth Plan Targets read as follows:

2.2.3 General Intensification

> 1. By the year 2015 and for each year thereafter, a minimum of 40 per cent of all residential development occurring annually within each upper – and single-tier municipality will be within the *built-up area.*

2.2.7 Designated Greenfield Areas

> 2. The *designated greenfield area* of each upper – or single-tier municipality will be planned to achieve a minimum *density target* that is not less than 50 residents and jobs combined per hectare.

[3] The Region has completed a land budget ("Region's Land Budget") which stipulates an urban boundary expansion of 70 - 85 hectares over the required time horizon in the Growth Plan of 2011–2031. On the other hand, the corporate entities represented by Messrs. Howe and Andres, together with the other Parties in this proceeding of like interest (collectively the "Landowners") have completed a land budget ("Landowners' Land Budget") which requires an expansion to the urban boundary of 1053 hectares.

POSITIONS OF THE PARTIES

[4] The Landowners argue that in determining the amount of land required to accommodate the Region's growth to 2031, as prescribed by Schedule 3 to the Growth Plan, one should use an assessment of housing demand and housing supply that is based on housing by unit type in the land budget analysis conducted. This housing needs analysis, according to the Landowners, was recommended by the Province of Ontario in 1995 when it published a document known as the Projection Methodology Guideline ("PMG"). The Landowners also contend that the land budget methodologies used by other municipalities in Ontario, when such municipalities conduct their land needs assessments and/or Growth Plan conformity exercises, can be properly characterized as a variation of the PMG.

[5] In addition to the appropriate methodology to be used, the Landowners submit that certain lands, i.e. existing provincial infrastructure and cemeteries, buffers, valley lands/tributaries/floodplains/fish habitat, lands not designated for development and provincially significant wetlands, should not be included when calculating the area of land in the designated greenfield area, as that phrase is defined in the Growth Plan ("Designated Greenfield Area" or "DGA"). These various categories were commonly referred to during this hearing as take outs ("Take Outs") and were listed in Exhibit 78(b) in this proceeding ("Exhibit 78(b)"). In simple terms the greater the Take Outs, the less available land area there is within the Designated Greenfield Area and therefore, the greater the likelihood or need for an expansion to the settlement area boundary.

[6] In support of the Landowners' position, Paul Britton, a partner at McNaughton, Hermsen, Britton, Clarkson Planning Limited, Paul Lowes, a principal with Sorensen Gravely Lowes Planning Associates Inc. and John Genest, a principal in the firm Malone Given Parson Ltd. provided expert land use planning evidence; Peter Norman chief economist at Altus Group gave expert testimony relating to economic and demographics; and Jeannette Gillezeau, an economist and a senior director of Altus Group Economic Consulting provided expert evidence in urban planning growth management and housing as well as employment land needs.

[7] The Region, on the other hand, asserts that the housing or market needs analysis is inappropriate because it is based on a forecasting methodology that generally looks backwards in time identifying trends and then taking these trends forward with some adjustments. The Region argues that the philosophy of the Growth Plan, with its predetermined forecasted population and prescribed Growth Plan Targets, results in the need to rethink the manner in which planning is done at the municipal level.

[8] The Region's Land Budget is based on a demand and capacity analysis. On the demand side, the Region takes the forecasted population in Schedule 3 and converts that population to units. Applying the provisions of s. 2.2.3.1 of the Growth Plan, the Region's analysis requires 45% of those units be assigned to the built up area as that phrase is defined in the Growth Plan ("Built Up Area"). The remaining units are then assessed based on their average person per unit value against the capacity of the DGA.

[9] In relation to Take Outs, it is the Region's position that Policies 2.2.7.2, 2.2.7.3 and 2.2.7.4 of the Growth Plan provide complete guidance with respect to the lands that are to be excluded from the DGA for the purpose of measuring density. The Region argues that, except for fish habitat, the Region's determination concerning Take Outs is correct and should be confirmed by this panel. During the course of this proceeding the Region acknowledged that fish habitat was an appropriate Take Out and, following the issuance of this decision, the specific area of fish habitat would be mutually agreed upon by the Landowners and the Region.

[10] Three witnesses were called to support the Region's position in this matter: Kevin Eby, Director of Community Planning for the Region and Daniel Kennaley, Director of Planning and Engineering Services for the Township of Woolwich provided land use planning testimony and Jamie Cook, a partner at Watson & Associates Economists Ltd. gave land use planning evidence focusing on long term growth management and land needs and as a land economist, specializing in demographics and long term forecasting. Bruce Curtis, Manager of Community Planning and Development in the Western Region Municipal Services Office of the MMAH also gave evidence in this matter. However, he did so under summons.

ISSUES

[11] The fundamental issue to be determined in this case is how much of an urban boundary expansion (“Urban Boundary Expansion”) for the Region is required so as to accommodate the population and employment forecasts set out in Schedule 3 and to meet the Growth Plan Targets.

[12] This fundamental issue gives rise to the following subsidiary issues:

(a) What land, if any, should be excluded from the Designated Greenfield Area under s. 2.2.7.2 of the Growth Plan when measuring the Density Target?

(b) Which land budget should be preferred?

ANALYSIS AND DISCUSSION

Take Outs

(i) Existing Provincial Infrastructure and Cemeteries

[13] The starting point in the analysis as to what lands should be excluded from the Designated Greenfield Area under s. 2.2.7.3 is the section itself. It prescribes how the Density Target is to be measured and reads as follows:

> This *density target* will be measured over the entire *designated greenfield* area of each upper – or single-tier municipality, excluding the following features where the features are both identified in any applicable official plan or provincial plan, and where the applicable provincial plan or policy statement prohibits development in the features: wetlands, coastal wetlands, woodlands, valley lands, area of natural and scientific interest, habitat of endangered species and threatened species, wildlife habitat, and fish habitat. The area of the features will be defined in accordance with the applicable provincial plan or policy statement that prohibits development in the features.

[14] The Landowners argue that in order to properly interpret this section, one begins with the definition of DGA in the Growth Plan which brings into play the definition of Settlement Area and the stipulation that such an area has lands “designated in an official plan for the development over the long term planning horizon”. The existing provincial infrastructure and cemeteries are not included by the Landowners in

calculating the area of the DGA for the purpose of the density calculation because these areas are not lands designated for development over the long term planning horizon.

[15] In our view, this approach ignores the specific requirements of s. 2.2.7.3 concerning exclusions and creates, incorrectly, an overly simplistic test for determining such exclusions, i.e. have the lands in question been designated for development over the long term planning horizon?

[16] Section 2.2.7.3 provides four key elements (“Key Elements”) for determining exclusions:

(i) The area of “features” is excluded from the DGA.

(ii) The “features” must be identified in either an applicable official plan or provincial plan.

(iii) The applicable provincial plan or policy statement must prohibit development in the “features”.

(iv) The “features” themselves are delineated and are not simply illustrative.

[17] Existing provincial infrastructure and cemeteries are not listed as features in s. 2.2.7.3 nor was any provincial plan or policy prohibition alluded to in argument. If we were to agree with the argument advanced by the Landowners in relation to these Take Outs, we would be effectively creating a new test or requirement for exclusions in 2.2.7.3 based on the definition of Settlement Area in the Growth Plan and, by so doing, some of the existing requirements would be rendered meaningless. The approach established and terminology used in s. 2.2.7.3 is clear. There is not, in our opinion, any need or obligation to alter the plain meaning of such language.

[18] In arriving at our conclusion we are guided in part, by the decision of the Supreme Court of Canada (“Court”) in *Rizzo & Rizzo Shoes Ltd (Re) [1998] 1 S.C.R. 27* (S.C.C.). In that case, the Court dealt with a claim by an employee of a bankrupt employer for termination pay, including vacation pay. The case turned on the issue of statutory interpretation of certain provisions of the *Employment Standards Act* (Ontario).

We adopt the language of Iacubucci, J. at paragraph 21 in this decision and his reference to that noted author, Elmer Driedger. Paragraph 21 reads in part:

> Although much has been written about the interpretation of legislation (see, e.g. Ruth Sullivan, Statutory Interpretation (1997); Ruth Sullivan, Driedger on the Construction of Statues (3rd ed. 1994) (hereinafter "Construction of Statues"); Pierre-André Côté, The Interpretation of Legislation in Canada (2nd ed. 1991), Elmer Driedger in Construction of Statues (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
>> Today there is only one principle or approach; namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[19] For purposes of the Growth Plan, it is our view that the overall thrust and scheme of this Plan is to achieve higher densities in the DGA and foster the development of more complete and compact communities. We are unaware of any policy basis in the Growth Plan which justifies removal of infrastructure and cemeteries from the measurement of the DGA. In fact the, language of the Growth Plan in chapter 2, "Where and How to Grow" is quite the opposite and succinctly summarizes, in our view, the scheme and object of the Plan. Section 2.1 reads, in part, as follows:

> There is a large supply of land already designated for future urban development in the GGH. In most communities there is enough land to accommodate projected growth based on the growth forecasts and intensification target and density targets of this Plan. It is important to optimize the use of the existing land supply to avoid over-designating new land for future urban development. This Plan's emphasis on intensification and optimizing the use of the existing land supply represents a new approach to city-building in the GGH, one which concentrates more on making better use of our existing infrastructure, and <u>less on continuously expanding the urban area.</u>(Board emphasis added)

[20] To suggest that some municipalities may encounter more difficulty than others in achieving the Density Target because of the existence of infrastructure and cemeteries is not, in our view, a compelling reason to accept the Landowners' argument. Any potential differences in the amount of infrastructure and cemetery land are not, in our estimation, of sufficient gravity to override the very concise language of 2.2.7.3.

[21] During the course of this hearing, much was also made of the manner in which other municipalities have treated Take Outs generally and infrastructure in particular. The obvious implication behind such arguments was that we should adhere to and be bound by, at least in part, the infrastructure decisions made elsewhere in the Province. Those decisions in other municipalities however, were made either because the parties involved reached a settlement or the infrastructure debate was not an issue between the parties. They were not made by another panel of this Board or the Superior Court based on an interpretive analysis of 2.2.7.3. Accordingly any such decisions are unique to the individual municipality and parties involved and are not binding on us.

[22] Our analysis of 2.2.7.3 leads to the conclusion that existing provincial infrastructure and cemeteries area should not be excluded from the DGA

(ii) Buffers

[23] Another Take Out in dispute is an area of land commonly referred to as buffers.

[24] The Landowners argue that buffers are functionally and integrally related to the features they protect. By excluding them from the DGA, ensures a level playing field, in terms of density required, between municipalities with differing amounts of protected features. The Landowners submit that the phrase “The area of the features” in 2.2.7.3 of the Growth Plan should be interpreted to include the entire area on which the development is prohibited, including the buffer.

[25] In our view, this position is unsustainable for a number of reasons.

[26] First, the term “buffer” is not mentioned in s. 2.2.7.3 of the Growth Plan.

[27] Second, although the Landowners point to Policy 2.1.6 of the Provincial Policy Statement, 2005 (“PPS”) as justification for the prohibition requirement contained in 2.2.7.3, the term buffer is not mentioned in Policy 2.1.6 nor is it specifically defined in the PPS.

[28] Third, in relation to the “protection” argument, we are of the view that s. 2.2.7.4 is directly on point and its provisions weaken considerably and perhaps, even entirely, the strength of that argument. That section reads as follows:

> 4. Policy 2.2.7.3 is provided for the purpose of measuring the minimum *density target* for *designated greenfield areas,* and is not intended to provide policy direction for protection of natural heritage features, areas and systems. (Board emphasis added.)

[29] Fourth, the evidence in this matter disclosed that a buffer is a development variable which makes it susceptible to modification or reclassification, thereby potentially providing for some form of development on it. As a result, a “buffer” is inconsistent with the rather precise language of Policy 2.2.7.3 which emphasizes the principle of prohibition of development.

[30] And fifth, additional guidance concerning the proper treatment of buffers is provided by The Ministry of Natural Resources Natural Heritage Reference Manual for Natural Heritage Policies of the Provincial Policy Statement, 2005, Section 13.5.4.2 Buffers. A portion thereof reads as follows:

> The PPS identifies significant features that should be protected, but it does not specifically require or address the delineation or protection of buffers.

And later, in the same Section it goes on to state:

> Buffers should not be treated as extensions of the natural feature; therefore, if a buffer is allowed to become wooded, the natural feature boundary should not be extended to include it.

The guidance from this manual clearly establishes, in our estimation, that buffers are not part of a feature and no specific requirement exists with provincial policy that prohibits development within them.

[31] To summarize therefore, we are of the opinion that the buffers/setbacks in Exhibit 78 (b) should not be excluded from the DGA.

(iii) Valley lands and Tributaries

[32] It was acknowledged in argument that tributaries are part of valley lands and accordingly, any determination made with respect to valley lands would apply to tributaries.

[33] The Landowners argue that valley lands is a feature listed in 2.2.7.3, that it is identified in an applicable official plan and that development in this feature is prohibited pursuant to the provisions of the PPS. As a result, the Landowners submit that valley lands should be excluded from the DGA. We are unable to agree for a few reasons.

[34] First, the prohibition in the PPS is found in s 2.1.4 which reads in part as follows:

2.1.4. Development….shall not be permitted in:

c. *significant valleylands* south and east of the Canadian Shield 2;

unless it has been demonstrated that there will be no *negative impacts* on the natural features or their *ecological functions*.

[35] This prohibition applies to "significant valley lands" specifically and is not absolute in its application because development is permitted in certain circumstances, i.e. when there is no negative impact on the natural features or their ecological functions. In our view, the "prohibition" referenced in 2.2.7.3 must be interpreted to mean an absolute prohibition because it is not qualified or made conditional in any way. The conditional language of s. 2.1.4 of the PPS is, in our view, decidedly inconsistent with Policy 2.2.7.3 and for that reason, cannot be used as satisfying the prohibition requirement of 2.2.7.3.

[36] Even if we are incorrect in our interpretation of the type of prohibition required by 2.2.7.3 there exists a more fundamental reason why we cannot accept the position being advanced by the Landowners. Simply put, the only applicable significant valley lands that have been identified in the ROP are the significant valley lands in the Region's four river valleys (Grand, Conestoga, Nith and Speed). Although the Landowners have attempted to create a broader area of significant valley lands by reference to sub-watershed studies or the Natural Heritage Reference Manual, we do

not believe that the evidence in this case establishes that these additional valley lands have been identified in any local official plan. As a consequence, these additional valley lands put forward by the Landowners do not meet the requirements of 2.2.7.3. Therefore, neither valley lands nor tributaries should be excluded from the DGA.

(iv) Floodplains

[37] The floodplain Take Out of the Landowners overlapped with their valley land Take Out since, in general terms, the limits of the valley lands were defined by regulatory flood limit. However, the Landowners also argued that floodways, being the area of the floodplain in which the PPS prohibits development, should also be excluded from the area of the DGA against which the Take Outs are measured because they are not designated for development and should not be treated as part of the Settlement Area. Again, we disagree.

[38] The term floodplain is not a word delineated in 2.2.7.3. and therefore it is not a feature for purposes of this section. Furthermore, the evidence in this matter, based on the cross examination of Mr. Britton, disclosed that a floodplain can be built on in certain circumstances. This proposed Take Out simply does not meet the clear and precise language of 2.2.7.3.

(v) Fish Habitat

[39] As we have already mentioned, the Region has acknowledged that fish habitat is a proper Take Out in this case. As a result, it is unnecessary for us to comment further other than to say that if the Parties fail to agree on the specific fish habitat area, that area will be determined by us.

(vi) Woodlots

[40] The argument concerning woodlots was essentially made by Mattamy Development Corporation through its planner, Mr. Lowes. The submission made was that locally significant woodlots should also be excluded from the DGA as all local

official plans speak to locally significant woodlands and the PPS prohibits development in significant woodlands.

[41] Although it is true that 2.2.7.3 does list the term "woodlots" as a feature, the evidence in this case did not, in our estimation, establish that woodlots have been identified specifically in an applicable official plan or provincial plan. Accordingly, and again based on the precise language of 2.2.7.3, woodlots should not be excluded from the DGA.

(vii) Land Not Designated for Development

[42] The Landowners also argue that there are two specific areas which are not designated for development over the long term planning horizon and accordingly, should not be included in the DGA for purposes of the Density Target calculation. These areas are Breslau (Forwell Policy Area) and Ayr Special Policy Area (collectively the "Breslau and Ayr Lands").

[43] Again, our view of the matter is that even though there may be limits to or restrictions on development in these areas at this time, s. 2.2.7.3 does not, by its very language, contemplate such lands being excluded from the DGA. As we have already mentioned, earlier in these reasons, any land to be excluded must fall squarely within the Key Elements of 2.2.7.3. To simply suggest that land not designated for development over the long term is justification for exclusion is too casual an approach to Take Outs and ignores the very precise requirements of 2.2.7.3.

[44] We do not believe that the Breslau and Ayr Lands should be excluded from the DGA.

(viii) Provincially Significant Wetlands

[45] A final category of Take Outs which is set out in Exhibit 78 (b) but which did not receive a great deal of comment is provincially significant wetlands ("PSW"). Section 2.1.3 (b) of the PPS specifically prohibits development of significant wetlands in Ecoregions 5E, 6E and 7E. In view of this prohibition, the characterization of a wetland

as a “feature” in s. 2.2.7.3 of the Growth Plan and on the basis that the one identified in the Region falls within the area of land referenced in 2.1.3 (b) of the PPS, the PSW should be excluded from the DGA in our view.

[46] One final comment in relation to this issue should be made. To the extent one argues that s. 14(4) of the Places To Grow Act should influence any determination made with respect to Take Outs and our analysis in relation to such determination, that argument is not convincing for two reasons. First, there is not, in our view, any conflict between s. 2.2.7.3 of the Growth Plan and any provision of the PPS. Section 2.2.7.3 is specific in its language and clear in its application. The level and degree of specificity in this section leads us to interpret it as we have. And second, as we have already mentioned in these reasons, policy 2.2.7.4 provides clear direction in relation to the matter of protection of natural heritage features, areas and systems.

METHODOLOGY

[47] The Landowners prepared a land budget based on historical propensities and a detailed land inventory breakdown. It was a housing by type analysis. The Region, on the other hand, focused on demand and capacity and, according to the Region, was consistent with previously adopted growth strategy. As mentioned earlier, the Landowners implemented the PMG whereas the Region did not.

[48] Although the methodologies differed in approach, there were areas such as student housing and allocation to the Built Up Area in which there were no significant differences. In our view, neither approach was perfect; each had its strengths as well as weaknesses.

[49] We do not intend, in the course of these reasons, to address or detail each argument advanced and calculation made, but rather, refer to those matters (“Determining Factors”) which influenced our decision as to which land budget was most appropriate in this case. These Determining Factors are Aging in Place, Range and Mix of Housing, Land Inventory, Additional Apartment Units and Conflict with PPS.

Aging in Place

[50] A great deal of evidence in this hearing was devoted to the issue of aging in place by individuals. Simply put, aging in place refers to a person's choice to remain in his or her home, and neighbourhood, well into their later years of life.

[51] The Landowners argue that aging in place is a form of life style which will continue and that seniors will not change their housing choices in the future to any great extent. The Region however, submits that on a go forward basis, through the 20 year planning horizon of 2011-2031, the Region of Waterloo will witness more movement by seniors out of their homes and into apartments. The effect of such movement, according to the Region, will be to recycle the existing ground related housing units which will then become available to accommodate new families that traditionally are the market for new greenfield and semi-detached housing.

[53] Although the CMHC document entitled "Housing for Older Canadians: The Definitive Guide to the Over 55 Market" does, in part, embody a potential shift in thinking to support the Region's contention, the preponderance of information available suggests otherwise. For example, in the February 2008 CMHC publication, RESEARCH HIGHLIGHT Impacts of Aging on the Canadian Population on Housing and Communities.. it is stated at p. 2:

> Most seniors want to age in place in familiar surroundings until their health makes this impossible. In a recent survey, at least 85% of those over 55 said that they planned to remain in their present home for as long as possible even if there were changes to their health.

And in the Canadian Housing Observer, 2011 publication, at p. 114 it reads:

> About 20% of households with maintainers aged 65 and over moved in the five years preceeding the 2006 Census. Of households with maintainers aged 75 and over, only about 17% moved between 2001 and 2006. These mobility rates are significantly lower than for non-senior households (at 44%). They confirm that a large majority of seniors are choosing to age in place, that is, to continue to live in their current home and a familiar community for as long as possible even if their health changes.

[54] We agree with Ms. Gillezeau when she states “And when you’ve lived in a house for 30 years, that’s your home and that is why seniors stay in their houses, is because that’s their home, their neighbours are their neighbours” (Transcript for August 1, 2012.p. 206)

[55] In the final analysis, the change in housing choice by seniors, as suggested by the Region, is not, in our estimation, supported by the evidence presented in this case, and the Region’s methodology in relation to this issue, is flawed, as a result.

Range and Mix of Housing

[56] The importance of a range and mix of housing in a land budget is evidenced by the numerous references to such range and mix in the Growth Plan. For example, in s. 2.1 it states:

> This Plan is about building complete communities, whether urban or rural. These are communities that are well designed, offer transportation choices, accommodate people at all stages of life and have the right mix of housing…

[57] Another example is found in s. 2.2.3.6 (i) under the General Intensification Heading. It requires all municipalities to develop and implement through their official plans and other supporting documents, a strategy and policies to phase in and achieve intensification and the intensification target. This strategy is to, inter alia,:

> (i) plan for a range and mix of housing taking into account affordable housing needs.

[58] The Landowners’ Land Budget contains a very specific range and mix of housing based upon historical propensities. Although approximately six or seven of these graphical propensities (out of a total of 650) had some irregularity to them, those irregularities did not, in our view, taint or otherwise diminish the reliability of the other 640 measurable trends presented. The detail of analysis in this regard is impressive.

[59] The Region’s Land Budget however did not have the degree of specificity which the Landowners presented and which, in our opinion, is contemplated by the Growth Plan. The Region appeared content with the proposition that it would be able to

effectively deal with the range and mix every five years when its official plan is reviewed as required by legislation. The Region's position was aptly described by Mr. Britton, when he said at p. 16 of his Witness Statement that "The Region's land budget suggests a housing strategy can be prepared in the future and following the approval of the ROP."

[60] In our opinion, the Growth Plan, by the very language of s. 2.2.6.3 (i) and elsewhere, requires that a housing strategy is to be prepared as an input to an official Plan and not be left, as suggested by the Region, to a later stage. By leaving such strategy to some distant time in the future creates an uncertainty which, in our estimation, is inconsistent with the provisions of the Plan itself.

Land Inventory

[61] The Landowners' Land Budget is dependent upon a detailed inventory of available supply based on building permits that have been issued to 2011 and on an analysis of the development potential of every vacant parcel of land in the DGA. This analysis provides for 50,293 units in the DGA whereas the Region's analysis results in a potential need for 56,588 units.

[62] The vacant parcels (i.e. no building permits issued) were allocated to the following categories for purposes of the analysis:

(a) lands subject to Registered Plans of Subdivision ("RPS Lands");

(b) lands subject to Draft Approved Plans of Subdivision ("DPS Lands");

(c) lands subject to approved Site Plans:

(d) lands subject to Pending Plans of Subdivision ("PPS Lands"); and

(e) uncommitted lands ("UL") (i.e. lands not subject to plans or active applications).

[63] The RPS Lands comprise approximately 32% of the DGA, the DPS Lands about 17% and the PPS Lands approximately 7%. Collectively these lands comprise an area greater than 50% of the DGA.

[64] In relation to the UL, it is true that the preparation of the inventory for such lands required the exercise of judgement; however, it is in our view significant that a large portion of the UL is based on the recently approved Rosenberg Secondary Plan, that the inventory was prepared with the minimum density target of the Growth Plan as a critical parameter and that the Region did not question the appropriateness of the density factors used to calculate such inventory. All of these factors contribute, in our view, to the legitimacy of the inventory so determined.

[65] The Region essentially questions the specificity used by Mr. Britton in his analysis. According to the Region, his detailed inventory is subject to too many variables which may very well affect its reliability. We do not agree.

[66] Although it is possible for certain lands categorized by Mr. Britton to be subject to future variation, we are not persuaded, as suggested by the Region, that the DGA will be able to accommodate a number of ground related units that is materially greater than what Mr. Britton estimated. Moreover, we are not satisfied that any such future variation will materially affect the analysis completed. It is, in our view, unrealistic to assume that the densities of development will be substantially higher than what the current levels of approvals dictate.

[67] We also agree with the argument that the detail of Mr. Britton's analysis is the inventory's strength. It will forecast generally the available supply in the DGA and, in particular, the supply of ground related units. The inventory analysis completed was, in our opinion, thorough and persuasive.

Additional Apartment Units

[68] One of the fundamental components of the Landowners' Land Budget is the unilateral adjustment made to apartments. This was done to achieve the requisite Intensification Target. It was also acknowledged that the vast majority of these increased apartment units would not be built within the planning horizon.

[69] The Region argues that, based on the language of s. 2.2.7.2 of the Growth Plan, the requisite density target must be achieved by the year 2031 and, as a result, the Landowners' Land Budget is fatally flawed. We do not agree.

[70] Section 2.2.7.2 is reproduced in paragraph [2] of these reasons. The section clearly states that the density target "will be planned to be achieved" as opposed to "will be achieved". Furthermore and perhaps more importantly, no date is specifically mentioned. The language used is simply not as demanding as what the Region suggests.

[71] Our interpretation of s. 2.2.7.2 is, in our view, reinforced when one considers this section in the context of other policies of the Growth Plan dealing with targets. For example s. 2.2.3.1 deals with a general intensification target and states explicitly that the target is to be achieved by the year 2015.

[72] In our opinion, where the Growth Plan requires that a target be actually met, that intent is expressly stated along with a specific date. The absence of a specific date in s. 2.2.7.2 indicates to us that it was not the Province's intent that density actually be achieved by a specific date.

[73] We are also of the view that our interpretation of s. 2.2.7.2 is consistent with the principle of statutory interpretation known as the principle of consistent expression. This principle is discussed by Ruth Sullivan in Sullivan on the Construction of Statutes, 5th edition. At pp. 214-215 she states:

> It is presumed that the legislature uses language carefully and consistently so that within a statute or other legislative instrument the same words have the same meaning and different words have different meanings. Another way of understanding this presumption is the legislature is presumed to avoid stylistic variation. Once a particular way of expressing a meaning has been adopted, it is used each time that meaning is intended. Given this practice, it makes sense to infer that where a different form of expression is used, a different meaning is intended.

And at p. 218 she comments:

> The presumption of consistent expression applies to not only individual words, but also to patterns of expression.

[74] In summary therefore, we are not persuaded by the Region's argument and even though the unilateral apartment adjustment may arguably be somewhat unorthodox, it is not fatal to the Landowners' position in our estimation.

Conflict with PPS

[75] The Region argues that references to density and intensification targets in s. 2.2.8.2 of the Plan are in conflict with the provisions of the PPS and accordingly, a housing by type analysis as completed by the Landowners cannot be used as a basis for a land budget analysis in a region which is subject to the Growth Plan. It is argued that the authority for this position is found in s. 14(2) of the Places to Grow Act. Section 14(2) states that in the event of a conflict between the Growth Plan and the PPS, the Growth Plan prevails except in limited circumstances, According to the Region, it is the role of the municipality to make reasonable choices as to how its urban form will develop on sustainability and planning objectives. In Mr. Eby's view, housing choice and affordability are "moving to the back of the bus" (Transcript July 16, 2012, p. 83) and are now secondary to increased densities and intensification. The Region argues that the Growth Plan occupies the field in relation to the Growth Plan Targets.

[76] The Landowners' position is that reference to the density and intensification targets in s. 2.2.8.2 was to simply emphasize their importance and not to provide any specific direction as to the methodology used in a land budget analysis.

[77] The language of s. 2.2.8.2 of the Growth Plan is an adaption of policy 1.1.3.9 (a) of the PPS and adds Growth Plan terminology such as Schedule 3 forecasts, density targets and intensification targets. What s. 2.2.8.2 doesn't do however is provide any substantive guidance in the methodology to be used in a land budget analysis. In our opinion, if the Provincial intent was to do so, clear and unequivocal language would have been used.

[78] In order for us to determine if any conflict exists as alleged by the Region it is necessary to invoke what is known as the presumption or principle of coherence. In *Lévis (City) v. Fraternité des policies de Lévis Inc.* [2007] 1 S.C.R. 591, Bastarche J. explained the concept of legislative conflict and the presumption of legislative coherence at paragraph 47:

> The starting point in any analysis of legislative conflict is that legislative coherence is presumed, and an interpretation which results in conflict should be eschewed unless it is unavoidable. The test for determining whether an unavoidable conflict exists is well stated by Professor Côté in his treatise on statutory interpretation:
>
> > According to case law, two statutes are not repugnant simply because they deal with the same subject: application of one must implicitly or explicitly preclude application of the other.
> >
> > (P.-A. Côté,The Interpretation of Legislation in Canada (3rd ed. 2000) at p.350)
>
> Thus, a law which provides for the expulsion of a train passenger who fails to pay the fare is not in conflict with another law that only provides for a fine because the application of one law did not exclude the application of the other (*Toronto Railway Co. v. Paget* (1909), 42 S.C.R. 488). Unavoidable conflicts, on the other hand, occur when two pieces of legislation are directly contradictory or where their concurrent application would lead to unreasonable or absurd results. A law, for example, which allows for the extension of a time limit for the filing of an appeal only before it expires is in direct conflict with another law which allows for an extension to be granted after the time limit has expired (*Massicotte v. Boutin [*1969[S.C.R. 818).

[79] Based on the foregoing, in our view s. 2.2.8.2 supplements or is an amplification of the provisions of s. 1.1.3.9 (a) of the PPS. There is not any conflict between the two and one does not preclude the application of the other. As a result, we do not accede to the argument being advanced by the Region in this regard.

Section 2.1

[80] Before concluding our remarks on this issue, some comments in relation to the application of s. 2.1 of the *Planning Act* (“Act”) are in order.

[81] The Region argues that Regional Council's decision in relation to the methodology adopted should be accepted by this panel since Council did not waiver in its endorsement of the Region's Land Budget, even though Council had before it the Landowners' Land Budget and received submissions from counsel for Activa Holdings Inc.

[82] The Landowners, on the other hand, argue that Council simply accepted the advice of its planning staff and was not making any policy decision.

[83] Section 2.1 of the Act requires that we "have regard to" the decision of Council. As to the meaning of this phrase, we are provided guidance by the Divisional Court in *Ottawa (City) v. Minto Communities Inc.* [2009] O.J. 4913. At paragraph 33, Aston J. stated:

> The words "have regard to" do not by themselves suggest more than minimal deference to the decision of Municipal Council. However, in the context of the Planning Act, and balancing the public interest mandates of both the Board and the municipality, I would agree with Member Stefanko in *Keswick Sutherland* that the Board has an obligation to at least scrutinize and carefully consider the Council decision, as well as the information and material that was before Council…However, the Board does not have to find that Council's decision is demonstrably unreasonable to arrive at a different conclusion.

[84] In this case, the minutes of Regional Council dated June 6, 2012 reflect that boundary expansions can be determined in the context of the Region's five year reviews, at least in the opinion of one Council member. Furthermore, it is undeniable, in our estimation, that a land budget exercise for purposes of the Growth Plan is an inherently detailed, complex and arduous process. To expect Council members to completely and assiduously appreciate each and every assumption made, statistical projection given and nuance associated with a particular methodology, would be unrealistic in the circumstances.

[85] In our view, we have, as required, carefully considered Council's decision in relation to the appropriate methodology to be employed. However, based upon our comments in relation to the Determining Factors and in light of the fact that we, and not Regional Council, had the benefit of hearing extensive evidence and submissions with

respect to each of the methodologies utilized, we do not agree with Regional Council that the Region's methodology should be endorsed.

DISPOSITION AND ORDER

[86] Based on all of the foregoing it is hereby ordered as follows:

(a) Subject to the Fish Habitat and the PSW, the Region's position on the Take Outs shall prevail; and

(b) The Landowners Land Budget is preferred to that of the Region's.

[87] In the interest of clarification, it is our intention that the determinations as above described with respect to Take Outs and the preferability of the Landowners' Land Budget shall be fused to arrive at the net developable area for purposes of the Urban Boundary Expansion. In this regard, if the Parties encounter any implementation or other issues, we may be spoken to at a mutually convenient time.

[88] Lastly, there are policies in the ROP which effectively allow for certain lands on which development may be physically constrained, to be exchanged for other lands which are not so constrained. These policies were referred to during this proceeding as Rationalization Policies. It is understood that the decisions which are set out in these reasons are not intended to be construed, nor should they be construed, as an endorsement of those policies by this panel. As the Parties acknowledged during the course of this hearing, the approval of the Rationalization Policies is a matter to be determined in another phase of this proceeding.

"Steven Stefanko"

STEVEN STEFANKO
VICE CHAIR

"Joseph E. Sniezek"

JOSEPH E. SNIEZEK
MEMBER