

ISSUE DATE:

Oct. 18, 2006

DECISION/ORDER NO:

2919



PL040456
PL050003

Ontario Municipal Board

Commission des affaires municipales de l'Ontario

Menkes Lakeshore Ltd. has appealed to the Ontario Municipal Board under subsection 22(7) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended, from Council's refusal or neglect to enact a proposed amendment to the Official Plan for the City of Toronto to redesignate land at the north side of Lake Shore Boulevard, west of Park Lawn Road from Office (Park Lawn Road/Lake Shore Boulevard Secondary Plan) to Mixed-Use and to add a site-specific policy to allow for a mixed use residential/commercial development to permit a high rise residential development

OMB File No. O040089

Menkes Lakeshore Ltd. has appealed to the Ontario Municipal Board under subsection 34(11) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended, from Council's refusal or neglect to enact a proposed amendment to Chapters 320 and 324 of the Etobicoke Zoning Code to rezone lands to permit the development of three residential towers with mixed office/commercial uses located at 2200 Lake Shore Boulevard West and 10 Park Lawn Road, in the City of Toronto (Etobicoke)

OMB File No. Z040061

Amexon Holdings Inc. has appealed to the Ontario Municipal Board under subsection 22(7) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from Council's refusal or neglect to enact a proposed amendment to the Official Plan for the City of Toronto (Etobicoke) to redesignate land at 60 – 80 Park Lawn Road from Office to Mixed Use to permit the development of a mixed-use residential, office/commercial development

O.M.B. File No.: O050005

Amexon Holdings Inc. has appealed to the Ontario Municipal Board under subsection 34(11) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from Council's refusal or neglect to enact a proposed amendment to the Etobicoke Zoning Code to rezone lands located at 60 – 80 Park Lawn Road to permit the development of three residential towers having a total of 924 dwelling units with retail and office space uses

O.M.B. File No.: Z050001

APPEARANCES:

Parties

Menkes Lakeshore Ltd.

Amexon Holdings Inc.

Counsel

A. J. Brown, H. Elston, D. Steinberg
and W. Ekins

M. Flynn-Guglietti

Petro J. Developments Limited	E. Costello and T. Alinsky
36 Park Lawn Road Inc.	M. Flowers and M. Khazanov
City of Toronto	G. Whicher
Kraft Canada Inc.	D. A. Trinaistich
Proudfoot Motels Ltd.	S. Gosnell
South Etobicoke Industrial Employers Association	A. Heisey
SNC Lavalin Inc.	A. McNeeley

DECISION DELIVERED BY SUSAN de AVELLAR SCHILLER

The central issue in this matter is whether a Mixed Use designation, permitting commercial and residential uses, should be placed on any or all of the lands generally known as the Park Lawn Block, in the City of Toronto.

Menkes Lakeshore Ltd. [Menkes] and Amexon Holdings Inc. [Amexon] appear in support of mixed commercial/residential uses and ask the Board to approve the official plan and zoning by-law amendments to permit these uses.

Petro J. Developments Limited [Petro J] and 36 Park Lawn Road Inc. [36] ask the Board to deal with the Block as a consistent whole in terms of official plan designations. They support the changes sought by Menkes and Amexon and ask the Board to extend those changes to apply to their properties as well.

The City of Toronto [City], Kraft Canada Inc. [Kraft], Proudfoot Motels Ltd. [Proudfoot], and South Etobicoke Industrial Employers Association [SEIEA] appear in opposition to a Mixed Use designation on the Block. SNC Lavalin Inc. neither called a case nor participated in the hearing beyond an initial attendance at the outset.

The Toronto Region Conservation Authority [TRCA], appearing as a party in a prehearing conference in this matter, had been particularly concerned with the impact of

development on the Mimico Creek and valley lands. TRCA sought leave to withdraw as a party to the hearing, advising the Board that its issues had been satisfactorily resolved with adjacent landowners. Midway through the hearing Proudfoot sought leave to withdraw, advising the Board that it, too, had reached agreement with parties opposite and no longer wished to oppose the applications in this proceeding. The Board granted these requests to withdraw.

Having heard the evidence of 25 experts qualified to give the Board opinion evidence, three participants of whom two were experienced business representatives and one an area resident, and submissions over approximately 50 hearing days, the Board finds that a Mixed Use designation that permits commercial and residential uses is appropriate for the Park Lawn Block as a whole. The Board further finds that the proposed zoning by-law amendments, filed by Amexon and Menkes to permit Mixed Use developments on their lands, are also appropriate. Here are the Board's reasons.

THE PARK LAWN BLOCK AND SURROUNDING AREA

The Park Lawn Block is an area of less than 6 hectares in size. It is located close to Lake Ontario and is bounded on the south by Lakeshore Boulevard, on the west by Mimico Creek, on the north by Canadian National Railway lines, with the Gardiner Expressway a bit further to the north, and on the east by Park Lawn Road. There are four properties within the Block. The most northerly is Amexon, which abuts the rail lands. The most southerly is Menkes, which sits at the corner of Lakeshore Boulevard and Park Lawn Road. Taken together, these two properties account for approximately 77% of the Block. Two, much smaller, properties sit between them: Petro J, adjacent to Amexon, and 36, which is south of Petro J and adjacent to Menkes.

The lands west of Mimico Creek are predominantly in residential use, many with recent residential developments both north and south of the railway lands.

On the east side of Park Lawn Road is a large site owned and occupied by Kraft and in use as the Christie Bakery. Although there is also a small Bank of Montreal facility on the east side of Park Lawn Road, the bakery represents the dominant use.

South of Lakeshore Boulevard is Humber Bay Park, a large and sprawling waterfront park that stretches into Lake Ontario on either side of the mouth of the Mimico Creek. The Park has walking and cycling trails and a large marina. Also south of Lakeshore Boulevard, to the west of the Park, are residential developments. South of Lakeshore Boulevard, to the east of the Park and across from the Kraft lands, is part of an area known as the Motel Strip Secondary Plan area. Proudfoot is located within the Motel Strip, opposite the Kraft lands. The Motel Strip Secondary Plan Area extends well east of the Kraft lands and ends at the Palace Pier high rise residential development that abuts the west side of the Humber River. In 1992, the Board issued a decision on the motel strip that allowed residential and commercial uses within the Motel Strip Secondary Plan Area, subject to certain requirements. The decision created a regime that anticipated significant residential redevelopment from the Humber River across to the Humber Bay Park. A 38m commercial strip was set for the south side of Lakeshore Boulevard to act as a buffer between the Kraft lands and the anticipated residential development.

North of the Gardiner Expressway, to the east of Park Lawn Road, is the Ontario Food Terminal. The Food Terminal is on a large site, surrounded by a mix of older residential neighbourhoods and various commercial uses. The Food Terminal is a major regional wholesale facility that relies on trucking access and is owned by the Ontario government.

A considerable distance to the west of the Park Lawn Block is the New Toronto Employment Area, designated by the City to receive financial incentives to develop industrial uses. At 12 hectares in size, the New Toronto Employment Area is more than double the size of the Park Lawn Block.

The Park Lawn Block, Kraft, the Ontario Food Terminal, the Motel Strip and the New Toronto Industrial Area are all within South Etobicoke, an area traditionally characterized by a mix of industrial and residential uses dispersed throughout.

EXISTING USES ON THE PARK LAWN BLOCK

The 1.61 hectares Amexon site has a complex of old industrial buildings that once housed the manufacturing plant for Noxema. The buildings have a vacancy rate of

nearly 40%. Planning and market experts for Amexon and economic development and market experts for the City agree that the tenancies are generally short term, and the tenants are generally start-up light industrial and commercial operations. Amexon market experts described them as “tenants of opportunity”, unlikely to remain for the long term. The City’s market expert described the buildings as serving as small business incubators, but acknowledged that there is an abundant supply of such buildings dispersed throughout the City.

The 0.69 hectares Petro J site was used intermittently as a bakery during the 1990’s. The building was demolished in 1999 and the site is now vacant.

The 0.6 hectares site at 36 Park Lawn currently houses a small printing operation.

The 2.93 hectares Menkes site is currently occupied by two older office buildings, one 7 storeys and one 3 storeys.

All four sites have extensive surface parking with multiple access points from Park Lawn Road.

PROPOSALS FOR FUTURE USE

Amexon is proposing official plan and zoning by-law amendments to permit two residential towers, with 588 units, which will each sit on a commercial/amenity podium. Amexon proposes locating the towers toward the rear of the property, abutting Mimico Creek. The front of the site, on Park Lawn Road, would have a 38m commercial buffer similar to the 38m commercial buffer established for the Motel Strip.

Menkes is proposing official plan and zoning by-law amendments to permit a ten-storey office building and three residential towers with 1,200 units. Each residential tower would sit atop a two to three storey retail podium. The podia would follow the Park Lawn and Lakeshore frontages, helping to define the edges of these major roads and continue a streetscape treatment of office and retail at grade.

The Amexon and Menkes proposals include underground parking to reduce substantially the surface parking that now occupies the sites. Although a matter to be

finalized at the site plan stage, the Board was advised that the four Park Lawn Block owners have been in discussions with a view to co-ordinating and sharing access to the properties to reduce the number of curb cuts on Park Lawn Road.

Neither Petro J nor 36 has a proposal for future use currently before the Board. The request from these two parties is that the Board modify the official plan amendments before the Board to enable the Block to be treated as a whole and be consistent across all four properties in terms of land use designations for permitted uses on the Block. Even if the Board is inclined to so modify the official plan amendments, Petro J and 36 would still need to make appropriate zoning by-law and site plan applications to the City if either wishes to pursue redevelopment of its site.

APPLICABLE PLANNING INSTRUMENTS

This proceeding arises from appeals dealing with applications for official plan and zoning by-law amendments on the Amexon and Menkes sites. At the time the applications were made, the planning instruments in force for these lands were the 1996 Provincial Policy Statement, as amended in 1997; the Metropolitan Toronto Official Plan, known as MetroPlan; the City of Etobicoke Official Plan and the Park Lawn Road/Lakeshore Boulevard Secondary Plan; and the City of Etobicoke zoning by-law. Between the time of the original applications and the first hearing event on these matters at the Board, the 2005 Provincial Policy Statement came into force and the City of Toronto adopted a proposed new Official Plan that was appealed to this Board.

Both Amexon and Menkes appealed the new Toronto Official Plan as it related to their properties in the Park Lawn Block. Neither Petro J nor 36 appealed the new Plan. A panel of this Board, differently constituted, is hearing the appeals against the proposed new Toronto Official Plan. By agreement of the parties at that hearing, the disposition of the Amexon and Menkes appeals of the proposed new Toronto Official Plan, as they relate to the Park Lawn Block, would be disposed of following, and consistent with, the decision of this panel of the Board in this proceeding.

In determining which planning instruments are applicable, the Board adopts the principle enunciated in *Clergy Properties Ltd. v. City of Mississauga*, [1996] 34 O.M.B.R. 277, namely that the application should be judged on the regime in place at the time of

the application. This is not a situation where applications were made and then lay dormant for a considerable period of time. The proponents worked steadily with the City and City procedures prior to appealing these matters to this Board. And the appeals to this Board only occurred after the City decision to simply defer these applications indefinitely. Nonetheless, because the City was, coincidentally, in the process of developing a new official plan, the Board also adopts the approach enunciated in *Dumart v. Woolwich (Township)*, [1997] O.M.B.D. 1817, relying on *Boothman v. Newcastle (Town)*, [1993] 29 O.M.B.R. 26, that the new Plan is "admissible, relevant but not determinative".

In determining which Provincial Policy Statement applies, the Board notes the clear language of the 2005 Provincial Policy Statement which, in Part II, states that it "...applies to all applications matters or proceedings commenced on or after March 1, 2005..." The only applications before the Board are the 2002 official plan and zoning by-law amendments submitted by Amexon and Stockton & Bush, this latter assumed later by Menkes. It is the appeals on these applications that trigger the Board's jurisdiction in this matter. The 2005 Provincial Policy Statement does not apply to this proceeding. This finding is not simply a matter of applying the *Clergy* principle, although applying that principle would elicit the same result. In this case, it is a matter of applying the clear language of the 2005 Provincial Policy Statement itself. The 1997 Provincial Policy Statement is the one that governs these matters.

The Board now turns to an analysis of the proposals in terms of the policy regime and requirements of MetroPlan, the City of Etobicoke Official Plan and applicable secondary plan, the Provincial Policy Statement and the new City of Toronto Official Plan.

CONFORMITY WITH METROPLAN

The Metropolitan Toronto Official Plan [MetroPlan] specifically encourages "reurbanization", a term equivalent to the more currently used "intensification". At section 2.1, the Plan sets as an objective:

...To create and a maintain a structure of Centres and Corridors through reurbanization that ... uses land, infrastructure and other services ... efficiently...

The Plan goes on to say, at section 2.1.1(3):

... Area Municipal official plans and zoning by-laws shall facilitate the concentration of new housing and employment in Metropolitan Centres and Metropolitan Corridors, as designated on Map 2...

Map 2 designates the Park Lawn Block as an Intermediate Centre. At section 2.1.2.2(24), the Plan specifically calls for "employment, residential and other compatible uses" in Intermediate Centres. The Plan does not designate the Park Lawn Block as a "Metropolitan Industrial/Employment Area".

MetroPlan encourages transit and identifies the particular opportunities for intensification associated with the provision of rapid transit. The Plan identifies the Park Lawn Block as a site for a relocated GO commuter rail station that would provide an opportunity for an integrated link with Metropolitan transit services. The City of Etobicoke Official Plan, particularly in the Park Lawn Road/Lakeshore Boulevard Secondary Plan, also emphasizes such gateway commuter rail/transit service interface for the area.

Employment targets for Metropolitan Centres are set out in Table 2 of MetroPlan. For Park Lawn, the target is 10,000 jobs by 2011. The Table also states:

... the indicated employment levels are premised on the implementation of relevant rapid transit infrastructure improvements identified on Map 3

Map 3 identifies the Park Lawn Block as the location for a new or relocated GO commuter rail station with a transit interface. The Board finds that MetroPlan set the proposed GO commuter rail station with transit interface as the condition precedent for realizing the projected employment targets.

The evidence before the Board is that employment in the Park Lawn centre has fallen significantly short of that target. The evidence before the Board is also that the proposed relocation of the GO commuter rail station to the Park Lawn area has not occurred, is in no current plan for GO, and will not occur in the foreseeable future if it occurs at all. In considering the matters before the Board in this proceeding, the Board attaches no weight to the remote possibility that a GO commuter rail station will be relocated to the Park Lawn area.

MetroPlan also identifies a green space system that emphasizes protection of, and public access to, this system. The Mimico Creek and valley lands that form the western boundary of the Park Lawn Block are part of this identified green space system. The evidence before the Board is that agreements between Toronto Region Conservation Authority and adjacent Park Lawn Block landowners will result in much improved protection, maintenance and access of the Mimico Creek valley lands as part of the redevelopment of the Park Lawn Block sites.

The Board finds that the proposals before the Board conform to the policy directions in MetroPlan.

COMPLIANCE WITH THE CITY OF ETOBICOKE OFFICIAL PLAN AND THE PARK LAWN ROAD/LAKESHORE BOULEVARD SECONDARY PLAN

The City of Etobicoke Official Plan [CEOP] was designed to provide a planning framework for development of the municipality. As such, it specifically recognizes and anticipates changes to the land use designations in the Plan. And it establishes specific criteria to evaluate the appropriateness of proposed changes.

In its Urban Structure Map, the Plan identifies the Park Lawn Block as the site of a new or relocated GO commuter rail station, consistent with the parallel identification in MetroPlan. That map also identifies lands in this block as Centres and Major Open Space. The Land Use Map carries forward the Open Space designation and refines the Centre designation as Office. The Office designation is then carried forward into the Secondary Plan.

The Park Lawn Block is in Area 2 of the Secondary Plan; the Kraft lands are in Area 3. While Area 3 is designated Industrial, Area 2, in section 16.2.1.2

... is designated for both residential and employment generating uses with office development focussing on the Park Lawn Road and Lakeshore Boulevard intersection.

In considering office development, however, the Secondary Plan also emphasizes the importance of transit improvements to the likelihood of achieving additional office development, and specifically references the potential new GO

commuter rail/transit interface Gateway facility to be in the Park Lawn area. At section 16.4, the Plan states:

...The existing potential for office use is limited by the capacity of the transportation system. Intensification of office development may be permitted with the introduction of new transit services such as the Mimico GO Gateway facility ...

The proposals before the Board are to change the land use designation from Office to Mixed Use. The Plan has two key sections that set out specific criteria against which this proposed change must be tested. These sections are 4.6.9, for proposed amendments to delete an Office designation, and 4.5.10 for proposed amendments to add or expand a Mixed Use designation.

Tests in section 4.6.9 to Delete an Office Designation:

This section sets out five criteria for evaluating proposals to delete an Office designation:

a) viability of the remainder of the designation; and

b) viability of the Centre to function as an Office node

For the Park Lawn Block, criteria a) and b) are closely related. The Board heard from several economists and market experts on these criteria: three in support of the change and one, appearing for the City, in opposition. The Board also heard from a planner responsible for economic development, appearing for the City, who addressed these areas. All agree that the Park Lawn Block has not achieved its target office employment growth. Various reasons for the failure to achieve the goals were canvassed in evidence, but two, in particular, stand out.

1. New investment in office space has tended to target areas, often outside the City, where the tax regimes are significantly less onerous.

No expert disputed this trend or the reason. The City witness responsible for economic development testified that the City intended to introduce a new tax regime that would make City office sites more competitive with those in outlying areas. While

the City may have an intention to do this, the evidence before the Board is that the City does not have the authority to introduce the changes discussed.

What the City has done is create a preferential regime for industrial and manufacturing businesses locating in the New Toronto Employment Area. City initiatives in the New Toronto Employment Area are important to the matters now before the Board because they have created a second area of competition with the Park Lawn Block where the City's own initiatives have placed the Park Lawn Block at a distinct disadvantage. This situation arises as follows: although the Park Lawn Block is designated office, the uses that are permitted are wide-ranging and include light industrial uses. Not only does the Park Lawn Block compete with other, more desirable locations for office use, it must compete with the New Toronto Employment Area for new light industrial use.

The New Toronto Employment Area is much larger than the Park Lawn Block. The City witness acknowledged that, in this area, the City's economic development agency (TEDCO) acquired land; the City adopted a Community Improvement Program and introduced a Tax Increment Financing scheme to subsidize and assist new industrial development in this area. In fact, a food related tenant that initially located in the Amexon buildings moved to new headquarters in the New Toronto Employment Area, presumably taking advantage of the beneficial tax regime there. Further, the City listed several areas targeted for tax treatment similar to that of the New Toronto Employment Area, but the Park Lawn Block was notable by its absence from this list.

Taken together, the result for possible new office investment in the Park Lawn Block is that developments must compete with newer space, often built to a higher amenity standard but costing less because of the tax regime. As for industrial users, the City has made clear through its own actions that the Park Lawn Block is not a preferred location. No new office space has been built in the Secondary Plan area since the Plan's inception – a matter confirmed by both the market expert appearing for Amexon and the City planner appearing under summons.

2. To the extent that new office space has been built in the City, it has tended to be near rapid transit nodes with easy accessibility for commuting workers.

No rapid transit serves the Park Lawn Block. Proposed improvements to the streetcar line on Lakeshore will improve transit in the area, but it is not rapid transit nor commuter rail for workers to gain fast and easy transit access to the Block. Market experts and planners appearing in support of the changed designation – notably Mr. Warren Sorensen, a former Commissioner of Planning for Etobicoke – were adamant in their opinion that the successful achievement of the office employment targets for Park Lawn were premised on the proposed new or relocated GO commuter rail station. The absence of this substantial commuter transit improvement, exacerbated by the lack of a beneficial tax regime, provided a significant basis for concluding that a change in designation is appropriate.

The importance of the GO commuter rail station to the achievement of office employment targets in the Park Lawn Block was an opinion also held initially by Mr. Peter Moore, a qualified land use planner appearing for the City. Following a break in the hearing day, Mr. Moore's evidence in chief appeared to shift and he appeared to resile from his initial opinion – an opinion that had been set out in his expert witness statement and which he had proffered in sworn testimony earlier that day. Under questioning from the Board, Mr. Moore testified that, during the recess and while he was still under examination in chief, he had been told by counsel for the City to phone certain staff at the City to review and revisit this opinion. Mr. Moore testified that he believed he was being told by counsel that his opinion was in error and that he should consult with other staff with a view to changing his opinion on the key importance of the GO commuter rail station and transit interface to the ability of the Park Lawn Block to achieve its office employment targets. He then testified that he had discussed the matter with another staff person and now wished to change his opinion and evidence.

This change was not a matter of clarifying or checking a fact; this was an expert opinion based, presumably, on a professional analysis. The opinion was also important to the City's case since the City was taking the position that achieving the projected employment targets was not tied to the development of the GO station and Gateway facility. In reversing this opinion following discussions with another City staff member, it was obvious to the Board that Mr. Moore's evidence had become severely compromised and it was no longer clear whether it was Mr. Moore's professional expert opinion evidence, or that of some other staff person at the City, that was being

presented by Mr. Moore. Following a full opportunity to consider the matter for several days and to make submissions, the City waived its right to continue to examine Mr. Moore in chief, advised the Board that it would not rely on any of Mr. Moore's testimony, acceded to the dismissal of the witness, and asked that the Board attach no weight to the evidence. Parties opposite waived their right to cross-examination and acceded to the dismissal of the witness. Under these circumstances, the Board attaches no weight to Mr. Moore's evidence.

Other planning witnesses for the City maintained the view that the GO commuter rail station and transit interface was *not* necessary to achieve the office centre employment targets. None were credible in dismissing the clear statement in MetroPlan that the targets were premised on the commuter rail and transit improvements. References to the apparent success of the New Toronto Employment Area failed to account for the substantially larger size of the New Toronto area, the focus on industrial employment in that area, or the beneficial tax regime enjoyed by businesses located in that area.

c) no adverse impact on the balance between employment and population in the area

Criterion (c) deals with the balance between population and employment. All witnesses addressing this matter agreed that the original targets for the relationship between population and employment in the area have been substantially adjusted over the years. Part of the adjustment results from the many site specific amendments that have been approved and that have the effect of more closely meeting the population figures than the employment ones. Mr. Peter Smith and Mr. Warren Sorensen, both qualified land use planners, were particularly persuasive in their evidence and professional opinions that the Secondary Plan area has been in transition, as witnessed by these site-specific amendments. This series of re-designations has effectively left the Park Lawn Block, within the larger Park Lawn Road/Lakeshore Boulevard Secondary Plan Area, to fulfill the employment targets for the area. Ms Jeanette Gillezeau, a qualified economist, presented an extensive analysis that concluded, among other things, that the introduction of residential uses on the Block would stimulate and help create additional demand for employment – demand that would not

be there without the economic impact and fiscal opportunities generated with the residential component.

The Board finds, on the evidence of the economic and planning experts appearing in support of the proposed re-designation, that the Park Lawn Block does not now properly perform its planned function as an office centre, is unlikely to do so in the foreseeable future, and is therefore not a viable office node. And although the proposal is to re-designate from office to mixed use, the evidence before the Board is that the proposal will result in an increase of 380 new jobs over what is there today. The Board further finds that the relationship of population to employment in the Secondary Plan area has changed over time with the evolution of development in the Secondary Plan area, and that the proposed relationship for the Park Lawn Block simply continues this trend and does not adversely affect that relationship.

d) a new logical and coherent land use boundary will result

Criterion (d) speaks to the need for a new, logical, coherent land use boundary and appropriate transition between uses. The eastern boundary of the Park Lawn Block is Park Lawn Road, which separates the industrial use of the Kraft lands east of Park Lawn Road from the office designation for the lands on the west side of Park Lawn Road. That boundary does not change. The Amexon lands, which are closest to the Kraft industrial operation, have proposed a 38m commercial buffer on the west side of Park Lawn Road, similar to that on the south side of Lakeshore Boulevard also opposite the Kraft lands. Menkes proposes a two to three storey commercial/amenity podium to define the edges of its lands along Park Lawn Road and turn the corner at Lakeshore Boulevard.

The western boundary of the Park Lawn Block is the Mimico Creek and valley lands. Those lands are also the existing boundary between the office designation and the residential uses on the west side of the Creek and valley lands. The planner appearing for Kraft opined that this boundary should remain and office and employment uses should abut the Mimico Creek and valley lands with residential being confined to the west side of the Creek.

Mr. Sorensen, appearing in support of the re-designation, effectively asks the Board to think differently about boundaries. Although natural features, like the Creek and valley lands, have traditionally been used to separate land uses, Mr. Sorensen asks the Board to consider the Creek and valley lands as a whole in their own right, rather than simply as a dividing marker. Specifically, he notes the importance attached to these lands as part of the natural environment and green space system that stretches from the Humber Bay Park to the south along the Creek to the north.

The Toronto Region Conservation Authority is anxious to secure and protect the valley lands, improve and regenerate the Creek, introduce a pedestrian trail on the east side of the Creek, and develop a pedestrian bridge to connect the east and west sides. The greatest likelihood of securing these substantial public benefits for protection and enjoyment of green space arises from the redevelopment of the adjacent lands. TRCA withdrew from this proceeding, advising the Board that it had reached agreement with Amexon and Menkes regarding the valley lands, pedestrian trail and contributions toward the pedestrian bridge to provide access across the Mimico Creek. In addition, the Board notes and commends Petro J and 36 for taking the initiative to have TRCA map the extent of the valley lands for their parcels as well, and to enter into similar agreements with TRCA regarding the provision of a pedestrian trail and financial contribution toward the pedestrian bridge.

These green space improvements can certainly be enjoyed by workers during breaks in the workday, and by members of the public in the broader vicinity. To that end, the proposed amendments to the planning instruments for the Block include provision for pedestrian connections from Park Lawn Road through to the proposed pedestrian trail. While such access is certainly important, the Board agrees that the greater use of these green space amenities is more likely to come from area residents. The Amexon proposal locates its residential components farthest away from Park Lawn Road and closest to the Mimico Creek valley lands. Menkes, with a corner site and considerable enhanced opportunities for access, has spread its residential and office/commercial components more broadly across its site. In both cases, the introduction of the Mixed Use designation reinforces the positive relationship between treasured green space and residential use.

The Board finds that a Mixed Use designation on the Park Lawn Block, with retail, commercial and amenity space along the edge of Park Lawn Road, forms a more appropriate transition from the industrial use to the east and the green space and residential to the west. As such, the Board further finds that the more logical, coherent and appropriate land use boundary is Park Lawn Road and not the Mimico Creek and its valley lands.

e) no adverse fiscal impact on the municipality or the school boards

The final criterion in this section, criterion (e), requires a fiscal impact study that demonstrates no adverse fiscal impact on the municipality or school boards. Full fiscal impact studies were undertaken by both Menkes and Amexon. The studies found no adverse fiscal impact, and no evidence was called in opposition to these findings.

Having regard to the foregoing, the Board finds that the deletion of the office designation on the Park Lawn Block satisfactorily meets the criteria set out in section 4.6.9 of the City of Etobicoke Official Plan.

Tests in s.4.5.10 to Introduce a Mixed Use Designation:

This section lists fourteen criteria against which a proposal to introduce a Mixed Use designation should be evaluated.

a) the likely impact of the proposed development on demand for office space in Centres

The evidence before the Board to deal with this criterion is essentially the same analysis as that presented for the similar criterion in s.4.6.9. The Board is satisfied, on the evidence of all the market analysts appearing in this matter, that the demand for office space in Centres will be unaffected by the introduction of a Mixed Use designation on these lands.

b) the supply of available floor space and lands in the City which are zoned for office space

All the market analysts agreed that the City has an ample supply of lands currently zoned for office space. With particular reference to the office space now available on the Amexon lands, even the City's market expert agreed that the City has a plethora of older buildings acting as business incubators that cater to small businesses and tenants of opportunity. In addition, Mr. John Genest, a market expert appearing for Amexon, found 1,400 hectares zoned for Office uses in the former City of Etobicoke and that the conversion of 5.8 hectares to Mixed Use would mean a loss of some 0.4% of those lands if no office space was built within the proposed Mixed Use designation. In this case, however, the proposals before the Board call for new office space to be built on the Park Lawn Block as part of the new Mixed Use designation.

c) the desire to maintain and promote Centres and Areas of Employment for employment generating uses

A genuine desire to maintain and promote Centres and Areas of Employment for employment generating uses is echoed in both the 1997 and 2005 Provincial Policy Statements and the new City of Toronto Official Plan, and is not in dispute. "Desire", however, must not be confused with "specific, effective and timely action" to maintain and promote employment generating uses. Planning is not simply about a community vision of what would be nice, nor is it simply an ambition identified by a particular property owner. To be effective, planning needs to weave together both vision and ambition, and leaven them both with a hard dose of what is realistically achievable. Ample time has passed for this area to develop as a centre or office node, if it was going to do that based simply on the designations in planning documents. And ample time has also passed for the appropriate authorities to have taken the specific steps that might have moved the vision closer to reality: the new or relocated GO station and transit interface; the beneficial tax regime, to identify just two.

In Mr. Sorensen's expert opinion, the original designation was undertaken with enthusiasm but has proven to be unrealistic and unachievable, given the broad changes in the market and economy. He agreed with Ms Gillezeau that the introduction of residential within a Mixed Use designation would stimulate employment; within this context, Mixed Use should be viewed as an employment designation.

The Board finds that a change in designation to Mixed Use supports, and is consistent with, a desire to promote employment-generating uses.

d) the proximity of the site to Medium or High Density residential designations

The uncontested evidence before the Board is that medium and high-density residential developments, both built and zoned, abound in the surrounding area.

e) the adequacy of local social and educational services

Amexon retained experts to undertake an extensive analysis of local social and educational services, and filed the resulting studies as Exhibits 68(a) and (b) in this proceeding. No evidence was presented to the Board to challenge the study results generally or the adequacy of local social and educational services specifically. The Board is satisfied that these services are adequate.

f) the level of accessibility and the proximity of the site to arterial roads, transit and expressways and the capacity of those facilities

No one disputes the fact that the Park Lawn Block is very well situated in terms of its accessibility and proximity to the Gardiner Expressway and its frontage on Park Lawn Road and Lakeshore Boulevard. The City raised four main points regarding road capacity and the impact of the proposed developments:

1. The Motel Strip Secondary Plan calls for redevelopment that carries a holding provision, requiring the proponents to demonstrate that there is sufficient road capacity to handle the development. The Motel Strip Secondary Plan was approved well prior to the Park Lawn applications and the Park Lawn applications should stand in line behind the Motel Strip.
2. Insufficient allocation was made for the potential future development and expansion of the Kraft site.

3. Excessive queuing on Park Lawn Road would result from the proposed developments.
4. Access to the Park Lawn Block from Park Lawn Road should be severely restricted and reduced to a single point of access.

On the question of the Motel Strip, the Board has considered two approaches. The first is simply this: the Motel Strip Secondary Plan was approved several years ago. It included a holding provision, requiring the proponents to demonstrate road capacity in order to lift the hold. Various owners on the Motel Strip have chosen, for whatever reason, not to bring forward proposals for redevelopment and, therefore, not to do the necessary traffic analyses that would form the basis for lifting the hold. Their decision not to proceed in a timely way cannot reasonably result in freezing the ability of other landowners from bringing forward proposals that would take up the capacity in the road system, and the Board so finds. In addition, a plain reading of the Board's earlier decision on the Motel Strip Secondary Plan in no way suggests that the capacity analysis would be an analysis of the capacity at the time the Secondary Plan was approved by the Board, as distinct from an analysis of the capacity at the time development proposals are brought forward. The Board dismisses outright the suggestion that other, non Motel Strip, owners need to stand in line behind Motel Strip owners before submitting plans for possible redevelopment of their properties.

Although the Board finds that there is no reasonable requirement for the Park Lawn Block to await the convenience of the Motel Strip in terms of submitting redevelopment proposals, the Board notes that the proponents in this proceeding were careful to undertake traffic impact analyses that included a notional redevelopment allocation to the Motel Strip. That allocation was based on an analysis by planners appearing for Menkes and Amexon, taking into account the requirements of the Motel Strip Secondary Plan, the historic take up of the Plan, and a projection of likely future development. The Board finds that any allocation under these circumstances is generous, that the allocation made by the proponents is reasonable, and the City's contention that the full possible redevelopment amount should be included in the traffic capacity analysis is unreasonable and unsupportable.

With regard to the redevelopment of the Kraft site, the City's transportation planning witness confirmed that his figures of 14,298m² of office space and 15,000m² of industrial space were historic numbers and that no recent inquiries had been made of Kraft to update these figures. Kraft's own professional planner presented figures that confirmed the 15,000m² of industrial space but only 5,000m² of office space. The proponents' traffic experts allocated approximately 9,500m² of office space for Kraft. In terms of traffic capacity analysis, this higher office figure results in less capacity remaining for the Park Lawn Block development. The Board finds that the proponents' allocation for possible future development of Kraft is both generous and reasonable, and further finds that the City's allocation is not supportable.

With regard to queuing on Park Lawn Road, the evidence before the Board is that Park Lawn Boulevard is used extensively in the AM peak. Eastbound traffic exits the Gardiner and enters Park Lawn Road, with a considerable amount of it going south to Lakeshore Boulevard and then east on Lakeshore. Lakeshore Boulevard is used as a pressure release for eastbound traffic on the Gardiner, with highway traffic signs on the Gardiner advising motorists of traffic conditions on both roadways. Park Lawn Road is one route from the Gardiner to the Lakeshore. The question then becomes: will the increase in traffic generated by a Mixed Use designation and the proposed developments create an unreasonable burden on the capacity of Park Lawn Road to operate properly?

The only traffic impact analysis presented to the Board is that prepared by the proponents. No other party presented any traffic analysis reports to counter the findings presented by the proponents. The traffic analysis presented to the Board suggested that there might, occasionally, be some queuing for cars exiting the Gardiner and turning right on to Park Lawn Road. The analysis is clear that this is projected to be an occasional effect, and one that occurs only in the AM peak.

In order to undertake such capacity analysis projections, traffic planners and engineers use various computer software programs. The programs used by the proponents were a combination of Synchro and SIM Traffic. The City's traffic expert criticized the use of these two programs, contending that they are inadequate for projected capacity analysis in this case. No reasonable alternative was offered and he

acknowledged, under cross-examination, that the proponents' traffic experts had undertaken the analysis in accordance with the City's requirements. In addition, the traffic experts all noted that actual roadway performance on the City's arterials is governed by a further computer software system – SCOOT – that operates in real time to shift traffic and control traffic signals. All also acknowledged that neither Synchro nor SIM Traffic have the ability to program in the positive impacts of SCOOT on actual traffic capacity and flow.

The City's traffic expert went on to suggest that the queuing on the Gardiner exit ramp might become so severe that a back up would occur on the Gardiner itself. Here, again, no capacity analysis or projections were put before the Board in support of this position. The Board finds the suggestion speculative in the extreme and, in the absence of separate supporting analysis, neither reasonable nor reliable.

The evidence before the Board was also that if a build out entirely within the intermediate office centre designation occurred, it would result in dramatically increased vehicular movement accessing the site in the AM peak. The City's traffic expert acknowledged that this would be the case, and further acknowledged that his concerns regarding traffic apply to any redevelopment on the Park Lawn Block, and that he would now close all access on to Park Lawn Road on both sides of the street (including the Kraft access) if he was able to do so. The Board had no evidence before it that any study had been undertaken to assess the appropriateness of such a move, nor that any recommendations to make such a change had been submitted to Council.

There are now seven access points from Park Lawn Road to sites on the Park Lawn Block. The proposals before the Board reduce this number to two. The City's traffic expert opined that access to the Park Lawn Block should, at a minimum, be restricted to a single signalized access point off Park Lawn Road, between Petro J and 36. Two unsignalized access points would also be permitted, one each for Amexon and Menkes, but turning movements to and from all three access points would be severely restricted. Under the section titled Transportation, at section 16.7.1.6, the CEOP states:

... In considering development or redevelopment proposals, Council shall ensure existing site access points are protected, including rail sidings, vehicular and freight access, and full turning movements ...

Section 16.7.3 modifies this somewhat, as follows:

... In consideration of traffic safety and the efficiency of the arterial road system, Council ... shall seek to minimize the number of private access points for new development onto Park Lawn Road and Lake Shore [sic] Boulevard. Access to new development and redevelopment along Park Lawn Road shall maintain the integrity of the existing access points into the ... [Kraft] industrial lands ...

The Conceptual Master Plan, presented for the Park Lawn Block as whole, showed a single signalized access point between Petro J and 36. In this regard, the Conceptual Master Plan proposes access that is similar to that suggested by the City's traffic expert. This access point would then, through an internal road system, serve all four properties if all four properties redeveloped for mixed use. However, there is no proposal for redevelopment of all four properties now before the Board. Reasonable access would still need to be provided to all four properties. And, by the requirements of s.16.7.3, the existing access points into the Kraft lands needs to be protected.

The northern Park Lawn Road access to the Kraft lands is the one that is used by trucks making deliveries to the site. It is also opposite the proposed access into the Amexon lands. Amexon proposes a signalized intersection at this point, designed to provide controlled access to Amexon as well as assist truck turning movements into the Kraft lands. Amexon further proposes that the signalized access be considered temporary, to be removed in favour of a better solution to traffic movements on each side of Park Lawn Road, should such solution present itself in the future.

The City's traffic expert objected to signalizing this intersection, testifying that sight lines for trucks coming south on Park Lawn would not permit safe stopping, and, secondly, that the distance was too short between that signal and the one at the intersection of Park Lawn Road and Lakeshore Boulevard. Finally, he objected to a temporary signal.

Based on the standard guidelines for sight lines and stopping distances for trucks, the Board is satisfied that trucks travelling south on Park Lawn Road at the *full permitted speed limit* may have difficulty seeing an intersection at the current northern access point for Kraft, and may have a subsequent difficulty in stopping safely. The Board cannot help but observe that if this is, indeed, a concern with an improved

intersection that serves both Kraft and Amexon, it is a condition that exists today. While this Kraft access is not signalized, vehicles are already occasionally stopped at this point – some to turn left into Kraft and others just moving slowly as they make their way down to Lakeshore Boulevard. So, either this access point is already a safety hazard and the authorities have failed to take the appropriate corrective action, or the on ground actual operation of the road has the trucks moving much more slowly than the posted speed limit in stretches where sightlines may be somewhat compromised and stopping distances need to be reduced accordingly. If the current access to this part of the Kraft lands is now a safety hazard, then the authorities should take the necessary steps and no further discussion is appropriate. If, however, a field study demonstrates that this access point is not a hazard, then the Board finds no credible basis for concluding that improvements to the intersection to serve both Kraft and Amexon would be inappropriate. Finally, on the questions of distance between signals and temporary signals, the City's credibility on both of these matters is undermined by the existence of a temporary signalized access that now exists on Lakeshore Boulevard that is also less than the preferred distance separation between signals. The evidence before the Board is that this temporary signalized access was installed at the urging of Kraft to assist vehicular movements onto its site.

g) the suitability of the site in terms of size and shape to accommodate the proposed density including on-site parking, landscaping and recreational facilities

Both Menkes and Amexon provided conceptual site plans showing elevations, landscaped areas, and parking. A conceptual site plan for all four properties in the Block was also prepared, although no site plan applications have been made by any proponent at this time. The purpose of the plans, as prepared, was to show that the site is capable of meeting the municipal parking standards, landscaped open space, and indoor amenity space, and this was the evidence presented by planners appearing for Amexon and Menkes. No credible challenge was presented to suggest that the site could not meet these standards; a more specific and detailed analysis will occur at the site plan application and review stage.

h) the desire to provide a range of dwelling types and building heights on sites of sufficient size as indicated in Section 2.2.6

Mr. Smith's firm evidence was that this section referred to sites, of one hectare or more, that are outside the boundaries of the Park Lawn Road, Lakeshore Boulevard Secondary Plan. On this basis, the Board finds that this criterion does not apply to lands within the Park Lawn Block.

i) the effect of increased traffic, so that no undue adverse impacts are created for local residential streets

The Park Lawn Block is bounded on the north by rail lines, on the west by the Mimico Creek, and on the east and south by two arterial roads: Park Lawn Road and Lakeshore Boulevard. There are no local residential streets in the Park Lawn Block and its distance from existing local residential streets is sufficient to satisfy the Board that no undue adverse impacts on local residential streets will be created.

j) the effect of the height and form of the development so that no undue adverse impacts in terms of overshadowing or loss of amenity are created for neighbouring residential uses

Shadow studies were prepared by the proponents and no adverse impacts from overshadowing were found. No contrary evidence was presented to the Board.

k) the relationship of the site to nearby lower density residential uses, if any, in view of the desire to provide a gradual transition in height and density, wherever possible, or other buffering measures

The Park Lawn Block is not adjacent to any lower density residential uses. The nearest lower density residential development is to the west of the Mimico Creek and valley lands. These lands, themselves, create a buffer and transition to the nearest low rise residential uses.

l) the degree to which the site is proximate or exposed to significant open space amenities such as valley lands or the waterfront

The entire Park Lawn Block abuts the Mimico Creek and valley lands, identified as a significant part of the greenspace system. Additionally, even the northern end of the Block, the Amexon property, is a few short minutes' walk to the huge and sprawling Humber Bay Park at the mouth of Mimico Creek south of Lakeshore Boulevard. The Board finds as a fact that all four properties within the Park Lawn Block are both proximate and exposed to significant open space amenities, notably both valley lands and the Lake Ontario waterfront.

m) the ability to meet housing targets, and

n) the desire to stay within the [preferred] population ranges

The City of Etobicoke Official Plan calls for the development of an additional 14,000 residential units over the life of the Plan. The evidence before the Board is that Etobicoke has fallen far short of this target, having achieved approximately 10,000 new housing units by April, 2005. The Plan also calls for a minimum population target of 300,000, within an acceptable range from about 280,000 to about 334,000. Etobicoke slightly exceeded this range in 2001, with a population of approximately 338,000. Since the Plan phrased the population target of 300,000 as a minimum, and did not state a maximum, the Board is satisfied that the population size is still reasonably within the order of magnitude envisioned by the Plan.

While there is no dispute that the target for housing units has not been met, there is disagreement on the question of how this target might be met. Specifically, City witnesses testified that the targets could be met by the anticipated redevelopment of sites within the Avenues designation of the City's new Official Plan. In support of this conclusion, the City's market expert pointed to background studies prepared for the new Plan. The figures relied upon by the City included residential units that were in applications but had not been processed or approved. The Board finds that the assumption that all such units in applications would be approved simply flies in the face of common sense and the City's own record of dealing with applications for redevelopment. Similarly, the assumption that the Avenues designation would take up the gap fails to account for fractured ownership and/or strong local opposition to the redevelopment of arterial roads that encircle existing neighbourhoods. On these points,

the Board prefers the extensive analysis of Ms Gillezeau that questioned the reliability of the City's projections.

The Board finds that the contribution toward meeting the housing unit targets that will be made by the proposals now before the Board is reasonable, appropriate, and reliable.

Compatibility with Existing Industry:

Kraft's Christie Bakery on the east side of Park Lawn Road is a long established, thriving industry. Section 16.4.1.5 of the Plan requires a review of development proposals to identify and minimize adverse impacts on existing industrial operations. The principal issues relating to compatibility deal with noise, air quality and odour from the bakery operations, and the extent to which any of these might reasonably be in conflict with residential or other sensitive uses within the proposed new Mixed Use designation.

Expert witnesses for all parties dealing with these issues agreed that the Ministry of Environment D-6 Guideline must be addressed. All witnesses also agreed that the Kraft facility is a Class II industry, requiring a minimum distance separation of 70m to a sensitive land use. The Kraft facility is located on the northern portions of the Kraft site, closest to the Amexon lands and farthest from the Menkes lands.

Noise:

Both Menkes and Amexon undertook extensive noise studies. Amexon's study, by agreement between Kraft and Amexon, was undertaken with Kraft's noise specialist. There are four principal areas in dispute:

1. Are there now sensitive receptors that might be impacted by Kraft operations, and would the Mixed Use designation result in sensitive receptors being permitted on the Park Lawn Block where none are now?

Although the Park Lawn Block does not currently have a sensitive receptor on its lands, all parties concede that the current planning permissions for the Block include

sensitive receptors. In addition, the Kraft noise specialist concedes that existing residential developments to the southeast and west of Kraft currently constitute sensitive receptors, and that additional residential developments on the Motel Strip would also be classified as sensitive receptors.

2. Does banging on the flour delivery trucks constitute an unacceptable noise impact?

In order to get all of the flour out of the flour delivery trucks, drivers will bang on the sides of the trucks to loosen the flour and get it to drop. The banging appears to occur at the discretion of the driver. While it might generally be predicted as a reasonably common occurrence, it cannot be specifically predicted for time or duration. The noise expert appearing for Menkes tested the banging, concluded that it was infrequent and the resulting noise would fall well within the NPC-205 guideline of 100 dBAI for infrequent impulsive noise. The noise expert for Amexon extrapolated from the Menkes numbers, added findings from the Kraft noise expert, and agreed with the conclusions of the Menkes noise expert. The Board is satisfied that noise from banging the flour trucks has been studied sufficiently and that the conclusion that such noise falls within the NPC-205 guideline for infrequent impulse noise is a reasonable and appropriate conclusion.

3. Does the current Certificate of Approval allow Kraft to take deliveries prior to 7:00 AM and, if so, would such deliveries be curtailed as a result of the proposed Mixed Use developments on the Park Lawn Block?

The noise experts disagreed on the appropriate interpretation of the current Kraft Certificate of Approval and whether it would now permit deliveries prior to 7:00 AM. The Certificate of Approval is not before this Board and the Board declines to make any finding on whether the current practices at the Kraft facility comply with that Certificate of Approval. The question of compliance with the Certificate of Approval is a matter for the Ministry of Environment. Allegations of current non-compliance are appropriately addressed to the Ministry. The Board notes that a Kraft witness testified that Kraft currently receives deliveries beginning at about 6:00 AM.

4. Would the proposed Mixed Use developments create a condition of non-compliance for Kraft with the Chapter 591 of the City of Toronto Municipal Code (the City noise control by-law)?

The Certificate of Approval aside, the City's noise control by-law restricts deliveries prior to 7:00 AM. Any sensitive receptor, currently existing or proposed for the future, could file a complaint with the City for noise from deliveries prior to 7:00 AM. Sensitive receptors already exist in the area. The Board is persuaded, on the analysis of Messrs. Penton and Coulter that deliveries would be clearly audible at existing residential receptors between 6:00 and 7:00 AM. Since Kraft is already required to comply with the City's noise control by-law, the Board finds that no significant difference in its compliance requirements would be precipitated by the introduction of a Mixed Use designation on the Park Lawn Block.

Air Quality and Odour:

The Board had before it a comprehensive analysis of both air quality and odour impacts for the Park Lawn Block as a whole. No party questioned the report's findings that no air quality issues are raised by the proposals. Odour, and its impact, was a matter in dispute. Odour is a very subjective thing. What is pleasing to some may be offensive to others. And different people are capable of discerning and identifying odours at different levels of concentration. The analytical approach to assess odour impact attempts to compensate for these differences, and there was no challenge to the basic methodology undertaken to assess odour.

Kraft was issued an Amended Certificate of Approval from the Ministry of Environment for its existing plant in 2005. No air quality or odour impact assessments were conducted for the purposes of this amended certificate and there does not appear to be any history of complaints regarding air quality or odour with regard to the Kraft facility.

The study undertaken for this proceeding shows small, just detectable, odour levels from Kraft are predicted to occur throughout the study area, which included the Motel Strip south of the Kraft lands as well as the Park Lawn Block. The worst-case odour impact for Amexon (greater than 5 OU/m³) is predicted to occur for less than 1

hour out of 365 days. And the worst case for incidents of greater than 3 OU/m³ is predicted to occur for approximately 17.5 hours out of 365 days. The Board is satisfied that baking odours at such low levels of incidence are trivial and that there is no issue of odour impact incompatibility between Kraft and the proposed Mixed Use designations for the Park Lawn Block.

Protecting a Food Cluster:

Witnesses for the City, Kraft and SEIEA referenced the importance of protecting what they termed the “food cluster”. The witness for SEIEA was persuasive in testifying that even large food processors rely on a critical mass of such industries to support construction and maintenance firms that specialize in the particular requirements for food handling. The continued economic health of the Kraft facility on Park Lawn, and the other food handling industries in the Toronto area, is clearly desirable. The Board is not persuaded, however, that the catchment area for this critical mass is as small as South Etobicoke, nor is the Board persuaded that Kraft is part of “food cluster” that is centred on Park Lawn Road. The City’s witnesses, in particular, cited the existence of the Ontario Food Terminal north of the Gardiner Expressway as forming a “food cluster” with Kraft. The Board rejects this conclusion outright. The fact that the Food Terminal and Kraft both deal with “food” does not mean they form an interrelated cluster. To the contrary, the evidence before the Board is that Kraft takes none of its ingredients from the Ontario Food Terminal and ships none of its finished product to the Food Terminal.

The City’s witnesses also argued that there was an important relationship between the Ontario Food Terminal and small food related businesses that might locate on the Amexon lands. The Board has already dealt with this in preceding sections, noting that the business that did rent space in the Amexon buildings subsequently relocated to the New Toronto Employment Area – this latter enjoying a beneficial tax regime not available on the Park Lawn Block.

The Board finds that the term “food cluster” is inappropriate to describe the actual condition along Park Lawn Road. The Board further finds that introducing a Mixed Use designation on the Park Lawn Block is compatible with adjacent industry and does not undermine any genuine “food cluster” relationship that may exist between food related industries within a much larger geographic area.

CONSISTENCY WITH THE PROVINCIAL POLICY STATEMENT

The applicable Provincial Policy Statement in this proceeding is the 1996 Provincial Policy Statement, as amended in 1997.

All of the land use planning experts who testified on this subject agree that the Menkes and Amexon proposals represent a land use pattern that makes efficient use of existing infrastructure and services, are an intensification of their lands, provide housing and protect the environment – all matters of importance to the Provincial Policy Statement. The principal disagreement rests on the question of whether this is effectively a conversion from employment lands and, if so, whether this change leaves sufficient land for employment purposes and contributes positively to economic development.

In analyzing and weighing the market evidence, the Board is satisfied that the lands are under utilized, are not performing their intended function as an office centre and are not likely to do so in the foreseeable future. The Board is also satisfied, from an analysis of this same evidence, that the proposals before the Board will stimulate economic development and make a positive contribution to the revitalization of this area. The Board considered this market evidence in tandem with the professional planning opinion of Mr. Sorensen, who was unshaken in his analysis that, in the context of the applicable planning instruments, a Mixed Use designation is an employment generating designation and the change to Mixed Use supports economic development.

The Board finds that the proposals to redesignate to, and redevelop as, Mixed Use are consistent with the Provincial Policy Statement.

DIRECTIONS IN THE NEW CITY OF TORONTO OFFICIAL PLAN

Although the new City of Toronto Official Plan is not determinative in this matter, the Board considered elements of the Plan that addressed the Park Lawn Block as part of the Board's practice to have regard to the decisions of Council.

This new Plan ties the Park Lawn Block to employment in two places. The first is in Map 2, Urban Structure, which identifies the Park Lawn Block as an Employment District. The second is in Map 14, Land Use Plan, which designates the Park Lawn

Block as an Employment Area. Kraft, the City, and SEIEA have all placed a great deal of emphasis on these two items. Witnesses appearing for the City, in particular, testified that the new Plan was the result of a comprehensive review and the identification of Employment District and the designation of Employment Area should take precedence over MetroPlan and the tests, reviewed above, in the City of Etobicoke Official Plan.

No land use planning expert testifying in this matter disputes the notion that the new Plan is, in general, the product of extensive study and a comprehensive review. There is sharp disagreement, however, on whether the particular decision to identify the Park Lawn Block as an Employment District and designate it as an Employment Area can be fairly described as the product of extensive study and comprehensive review.

In considering this matter, the Board looked first to the background studies for the Plan that identified employment districts and that recommended designating employment areas. In March 2002, the City issued a background study entitled "Historical Profile of Employment Districts 1991-2000". This study shows the Kraft lands on the east side of Park Lawn Road as an employment district but does not include the lands on the west side of Park Lawn Road in this employment district. The Park Lawn Block, in the City's own background study, was not identified as an employment district.

In May, 2002, the City issued another background report, this one titled "Where do we Grow from Here?" This report does not identify any of the Park Lawn Block in the Employment Areas category. The maps in the report that identify employment sub areas do identify the Kraft lands on the east side of Park Lawn Road as an employment area but, again, do not similarly identify any of the lands in the Park Lawn Block as employment areas. Although the City spent some three years preparing background studies for its new Plan, no witness was able to point the Board to any study that identified the Park Lawn Block as an employment district or area, nor could they point to any study that recommended that the Block be so identified and designated in the new Plan.

The evidence before the Board is that the impetus to designate the Park Lawn Block as "employment" came from Kraft, in a letter requesting the City to make this change in its Plan. The request was put before Council and Council directed the

change. The unchallenged evidence before the Board is that Council made this decision in the absence of any professional planning report that reviewed the request, analyzed the appropriateness of an employment designation for the Park Lawn Block, and recommended that this change be made. The mere fact that Council decides to change a designation in the Plan does not mean that Council had before it professional planning reports and analysis of the appropriateness of the change to provide a proper basis for Council to weigh the planning merits of such an important decision.

Both Kraft and the City suggested to the Board that the supporting planning analysis and professional planning advice might have been given orally to Council on this matter, but neither party called any evidence in support of this suggestion. Given the extensive nature of the background studies for the Plan as a whole, the Board finds it highly unlikely that any possible oral analysis, if indeed there even were such, would rise to the standard of the analyses found in the professional planning reports that specifically did not designate the Park Lawn Block for employment. On the matter of the decision to designate the Park Lawn Block as an employment area, the Board finds that there was no comprehensive review or analysis that set out the planning merits of such designation. Having regard to the evidence before the Board on the process through which Council reached its decision on this matter, the Board attaches no weight to the identification of the Park Lawn Block as an Employment District nor to the land use designation of the Park Lawn Block as an Employment Area in the new City of Toronto Official Plan.

CONSIDERING THE PARK LAWN BLOCK AS A WHOLE

All of the expert planning witnesses appearing before the Board agree that the Park Lawn Block should be considered as a whole. They all agree that the four properties share similar characteristics in terms of the planning attributes and locational factors that the Board must weigh in considering the Amexon and Menkes applications. Expert witnesses appearing for Kraft and the City made clear, in their reply witness statements, that they opposed the redesignation of the Petro J and 36 lands for the same reasons they opposed the redesignation of the Amexon and Menkes properties. The analysis and tests for redesignation of the Amexon and Menkes lands apply equally to Petro J and 36, the two small intervening properties.

Menkes and Amexon take up more than three quarters of the Block. A change to the designation for these two larger properties would leave the small middle sites of Petro J and 36 as remnant industrial parcels adjacent to high density mixed use development. The Board is persuaded by the evidence of Mr. Frank Lewinberg that these two small properties would then be unlikely to meet their planned function and prospects for their future redevelopment would be compromised.

The Conceptual Master Plan for the Block shows a sharp reduction in access points to Park Lawn Road in favour of access rights by way of an internal road that serves the entire Block. Expert reports filed by Amexon included consideration of the development of both Petro J and 36 within the context of the development of the Block as a whole. The Board is satisfied that the evidence it has heard on the appropriateness of a Mixed Use designation for Amexon and Menkes is relevant and applicable to the Park Lawn Block as whole, specifically including the two small, intervening sites. The conformity with MetroPlan, the tests in the City of Etobicoke Official Plan, and the consistency with the Provincial Policy Statement all apply equally to the intervening properties. Because of their size, these properties are at the same, or perhaps greater, disadvantage in terms of attracting new office investment or competing with the tax and financial regime the City has established for the New Toronto Employment Area. There are common issues of access, built form, compatibility with adjacent uses on the Block, compatibility with the Kraft facility on the east side of Park Lawn Road, and the opportunity to secure significant public benefit for the Mimico Creek and valley lands.

The Board finds that there is a clear and direct nexus between the proposed redesignation of the Amexon and Menkes lands and the planned function of the intervening properties. The Board is satisfied that all four properties on the Park Lawn Block should have the same land use designation. The Board is further satisfied that the evidence presented in this hearing represents a full and comprehensive review of the appropriateness of applying a Mixed Use designation to the full Block.

Neither Petro J nor 36 has a separate application and appeal before this Board to redesignate either property for Mixed Use, nor has either interest filed an appeal against the new City of Toronto Official Plan. The City submits that these two facts ought to be sufficient for the Board to require Petro J and 36 to bring forward new, separate

applications for official plan amendments that relate to their specific properties. If they did so, the City submits, they would then be subject to the 2005 Provincial Policy Statement and the new City of Toronto Official Plan. The Board agrees that a new pair of applications would be subject to the planning regime in place at the time of the applications. The Board disagrees on the need to make any such separate applications for official plan amendments to effect a change in the land use designation for Petro J and 36.

The Board now has proposed official plan amendments before it for Amexon and Menkes. The Board's jurisdiction to modify such privately proposed amendments is both broad and clear. The *Planning Act*, at section 17(50), provides the Board with specific authority to modify and official plan amendment:

...On an appeal...the Municipal Board may approve all or part of the plan as all or part of an Official Plan, make modifications to all or part of the Plan and approve all or part of the Plan as modified as an Official Plan or refuse to approve all or part of the plan...

The Board's authority to modify pre-dates the specific language of s. 17(50). The foundation case dealing with the Board's jurisdiction to modify official plan amendments is *Re Cloverdale Shopping Centre Ltd. and Etobicoke (Township)*, [1966] O.R. (2d) 439 (Ont. C.A.). The Court of Appeal confirmed the Board's jurisdiction to modify, as long as any changes are made "...without altering its essential nature or character..." The Court went on to hold that "modify" includes "extend or enlarge".

A series of Board and Court cases have reaffirmed the Board's jurisdiction to modify proposed official plan amendments to enlarge the land area to be affected by the amendment. The Board looks, in particular, to *Par Pak Ltd. v. Brampton (City)* (1998), 2 M.P.L.R. (3d) 230 (O.M.B.) where the Board granted a motion to extend a plan of subdivision to more than twice its initial land area, and introduce new uses. On appeal of the *Par Pak* decision, in *Maplehurst Bakeries Inc. v. Brampton (City)*(1992), 2 M.P.L.R. (3d) 266 (Ont. Div. Ct.), the Court again affirmed the Board authority to modify and expand, as long as the expansion was not to an "unreasonable extent" or the additional uses to be permitted not "completely incompatible and inappropriate to other permitted uses..." The Board notes *Re Town of Richmond Hill Zoning By-law No 448-91* (1994), 31 O.M.B.R. 43, where the Board, using its modification powers, added more

than 121 hectares to the total land area affected by the Official Plan Amendment. And in *Sedgewick Property Inc. v. Richmond Hill (Town)*, [2006] O.M.B.D. No. 96 (O.M.B.) the Board modified and enlarged the area to be affected by the Official Plan Amendment to "...allow comprehensive planning for a concession block of lands..."

The question then becomes: should the Board modify and enlarge the Amexon and Menkes amendments to include the Petro J and 36 lands in the area to be affected by a change in land use designation to Mixed Use?

In opposing such a modification, the City asks the Board to attach primacy to the City's decision to identify and designate the Park Lawn Block as employment lands. The City also suggests that the process by which the City designated these lands for employment uses was a full and comprehensive public process, and that the Board's process in this matter is not.

With regard to the role Council's decision should play, the City referred the Board to *114957 Canada Ltee (Spraytech, Societe d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241 where the Court spoke to the principle of subsidiarity and the importance of the role played by the level of government closest to the people affected by the particular decision. In that decision, the Court cited with approval *Nanaimo (City) v. Rascal Trucking Ltd.*, [2001] S.C.R. 231, in which the Court stated:

...that the courts must respect the responsibility of elected municipal bodies to serve the people who elected them and exercise caution to avoid substituting their views of what is best for the citizens for those of municipal councils...

In both of these cases, the Court was dealing with challenges to municipal jurisdiction to pass certain by-laws. The matters before the Board do not fall under this rubric. The challenge is not to the legal validity of the new City of Toronto Official Plan or to the authority of City Council to adopt or amend the Plan. The challenge is to the planning merits of, and planning basis for, the particular part of the City's decision that set the Park Lawn Block as an employment.

The City also asked the Board to consider *re Mississauga (City) Official Plan Amendment No. 20*, [2002] O.M.B.D. No. 533, in which a panel of this Board, differently constituted, observed that the Board's role is:

...adjudicative in nature and, unlike a duly elected Council, it does not have a primary mandate to develop a land-use plan for the municipality...The Board heard...of the significant public consultation process that preceded the passage of ...[the official plan amendment]...Given such circumstance, it is incumbent on this tribunal to be very sure of its ground when considering the replacement of Council's decision with its own ruling...

And this panel of the Board agrees, but does so with a key caveat: the municipality is exercising its authority under the *Planning Act*. Frequent reference is made throughout the *Act* to the need for those appealing a municipality's planning decision to set out their planning grounds for the appeal. In deciding appeals, this Board is expected to weigh the planning merits of an appeal. In so doing, the logical and reasonable extension is that the Board, in having regard to the planning decision of the municipality, will weigh and consider the planning merits and analysis upon which the municipality based its planning decision. This approach accords with s.1.1(d) of the *Planning Act*, which states that: "...The purposes of this *Act* are ... to provide for planning processes that are fair ..." In this case, the Board, as noted above, finds that the decision of the City to include the Park Lawn Block in an employment area identification in its urban structure and designation in its land use map was not based upon any discernible planning merits or analysis.

In reaching this conclusion, the Board has not usurped the function of the City. On the contrary, the Board is simply discharging its proper function to weigh the different perspectives and their underlying planning rationale. And that includes weighing both the perspective and the underlying rationale of the City. The Board must not artificially defer to the City when the planning justifications for City planning decisions are notably and compellingly wanting.

Counsel for the City submits that if the Board redesignates the Petro J and 36 lands, it would be doing so in the absence of a full and comprehensive public process. Full notice, in accordance with the Board's directions in such matters, of the intention of both Petro J and 36 to seek modification of the official plan amendments to include their properties was given well in advance of the start of this hearing. In fact, the addition of 36 as a party and the addition of this possible modification to the issue list was heard by the Board at a special motion hearing prior to the start of the full hearing of the merits. All of the surrounding landowners and all of the parties to this proceeding knew of the

intention to seek a modification. No further parties came forward and no new evidence was called by parties opposite to deal with the proposed modification as distinct from the evidence called to deal with the Amexon and Menkes applications. Also as noted above, the Board heard evidence and submissions from 25 expert witnesses over the course of approximately 50 days. The Board's process has been full, comprehensive and public.

Exhibit 132 in this proceeding is a comprehensive Official Plan Amendment for the Park Lawn Block as whole. This proposed Official Plan Amendment builds on the separate Official Plan Amendments brought to the Board by Amexon and Menkes. The comprehensive Official Plan Amendment applies only to the Park Lawn Block, and does not extend its reach beyond that Block. Nor does the comprehensive Official Plan Amendment alter the uses proposed in the Mixed Use designation sought by Amexon and Menkes; it simply applies the Mixed Use designation to the Petro J and 36 lands as well. The Board finds that, in doing so, the comprehensive Official Plan Amendment simply provides an appropriate land use designation consistently across the four properties that comprise the Park Lawn Block.

APPLICABILITY OF SECTION 37

This proceeding began with a prehearing conference, held some six months prior to the start of the hearing. A consolidated issues list was presented to the Board on consent of the parties. That list, subsequently found as Attachment B to the Board's procedural order to govern this hearing, contained 49 issues. The City has been a party to this proceeding from the outset. Not one of the 49 issues referenced section 37, either its applicability if the Board holds in favour of the appellants or the benefits the City would be seeking in a section 37 agreements under these circumstances.

Subsequent to the issuance of the procedural order, but prior to the commencement of the hearing, Petro J and 36 brought motions to the Board. Petro J was already a party, but now wished to amend the issues list by adding an issue. 36 was seeking party status and also wished to amend the issues list with the addition of one issue. The Board's decision on the motions resulted in both the addition of 36 as a party and the amendment of the issues list.

At no time prior to the commencement of the hearing did the City, or any other party, bring forward a motion to amend the issues list and add matters relating to section 37 to that list.

Approximately one week into the hearing the City indicated that it wished to add to the issues list matters dealing with section 37, in particular the financial contributions the City would like to receive from the proponents to fund section 37 benefits. The City supported this request by suggesting to the Board that section 37 benefits are always an issue and are a matter on which the Board should be satisfied. A witness statement filed by the City made reference to asking the Board, in the event the Board allows the appeals, to withhold its Order until section 37 agreements have been signed. But the witness statement did not set out the benefits sought by the City nor did it provide any analysis to justify specific benefits that were, presumably, being sought. In processing these applications at the City, the first report referenced section 37 benefits but the final report did not. Council's decision on the final report was to defer these applications indefinitely. As a result, the City itself engaged in no identifiable process to specify possible section 37 benefits it might seek from the proponents.

The City had an opportunity to set out the section 37 benefits it was seeking when the applications were being considered by the City. It did not do so. The City had a further opportunity to raise section 37 benefits as an issue in the original consolidated issues list. It did not do so. The City had yet another opportunity to bring a motion to the Board, prior to the commencement of the hearing, to amend the issues list and add matters relating to section 37 benefits. It did not do so.

The Board's process with prehearing conferences, procedural orders, and its rules, are all focused on a single goal: ensuring, to the greatest extent possible, that parties receive a full, fair, and timely hearing. With the emphasis on "fair", the Board insists on an issues list that is set and known prior to the start of a hearing. The exception would usually be in circumstances where the party seeking to amend the list after the start of a hearing could not reasonably have identified the issue prior to the start of the hearing, and where the absence of the issue would negate a fair hearing.

In this case, the City most certainly knew, or ought reasonably to have known, that it intended to place section 37 benefits before the Board as an issue to be decided

in this matter. The City is not credible in suggesting that the failure to place section 37 benefits on the issues list was the fault of outside counsel who appeared for the City at the prehearing. Making this allegation in the absence of any supporting material does a singular disservice to the outside counsel in question, and the Board attaches no weight to this suggestion.

The City, supported by Kraft and SEIEA, then submits that it would be unfair to have the issues list stand without adding section 37 benefits to the list. What is unfair is trial by ambush; what is fair is to ensure that all parties know the case they will have to meet in sufficient time to meet that case.

In addition, there was no indication before the Board, prior to this occasion, to suggest that the question of section 37 benefits and agreements for the Menkes and Amexon proposals were issues that were being seriously studied by the City. The Board finds it difficult to believe that if section 37 benefits were so important in this matter the City would have proceeded, as it apparently did, without a staff analysis or in-depth study devoted to section 37 benefits the City might seek from these proponents.

The Board finds that adding section 37 benefits to the issues list after the start of the hearing would be both unfair and inappropriate. The Board declines to amend the issues list.

COSTS

Some parties indicated that they might wish to seek costs in this matter. Any party wishing to seek costs must advise the Board within 60 days of the date of this decision that they intend to seek costs. On receiving such advice, the Board will take such steps and make such other directions as it considers appropriate.

SITE PLAN MATTERS

While no site plan was before the Board in this proceeding, certain details of the proposed developments will have to be settled at the site plan stage. For the sake of consistency, and given the complexities of this matter, this panel of the Board will remain available to hear any appeals that may be made to this Board on subsequent site plan matters.

The appeals are allowed in part. The Official Plan Amendments filed by Amexon and Menkes are modified and enlarged to cover the four properties that comprise the Park Lawn Block: Amexon, Petro J, 36, and Menkes. The Comprehensive Official Plan Amendment that gives effect to this modification and enlargement, filed as Exhibit 132 in this proceeding, is approved. The proposed zoning by-law amendment for Amexon, filed as Exhibit 121 in this proceeding, and the proposed zoning by-law for Menkes, filed as Exhibit 81 in this proceeding, are approved.

The Board's Order is withheld for 30 days from the date of this decision to allow the landowners and the City the opportunity to review these planning instruments in detail to ensure that the form of these instruments conforms to the City's usual form. The City is to file with the Board, within 30 days from the date of this decision, a final form of the approved Official Plan Amendment and of the two implementing zoning by-law amendments.

If difficulties arise, the Board may be spoken to.

"Susan de Avellar Schiller"

SUSAN de AVELLAR SCHILLER
MEMBER