

ISSUE DATE:

Dec. 04, 2009



PL090414

Ontario Municipal Board
Commission des affaires municipales de l'Ontario

IN THE MATTER OF subsection 17(24) of the *Planning Act*, R.S.O. 1990, C. P. 13, as amended

Appellant: Ford Motor Company of Canada Limited
Appellant: TransCanada Energy Ltd.
Subject: Proposed Official Plan Amendment No. 296
Municipality: Town of Oakville
OMB Case No.: PL090414
OMB File No.: PL090414

IN THE MATTER OF subsection 38(4) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended

Appellant: Ford Motor Company of Canada Limited
Appellant: TransCanada Energy Ltd.
Subject: Interim Control By-law No. 2009-065
Municipality: Town of Oakville
OMB Case No.: PL090414
OMB File No.: PL090470

APPEARANCES:

Parties

Ford Motor Company of Canada Limited

TransCanada Energy Ltd.

The Town of Oakville

Counsel

G. Swinkin

N. Smiley and J. Inglis

J. Doherty and D. Sunday

DECISION DELIVERED BY A. CHRISTOU AND ORDER OF THE BOARD

Ford Motor Company of Canada Limited (Ford) and TransCanada Energy Ltd. (TransCanada) have appealed the Council of the Town of Oakville's (Oakville) enactment of Proposed Official Plan Amendment No. 296 (OPA 296) and the Town of Oakville's passing on Interim Control By-law No. 2009-065 (ICBL), dated March 30, 2009.

The purpose of OPA 296 is to replace existing policies with respect to smaller and mid size power generation facilities with “interim” policies prohibiting facilities with an energy production capacity greater than 10 MW, pending the review and development of more detailed criteria. ICBL No. 2009-065 prohibits power generation facilities with energy production capacity greater than 10 MW on lands zoned E1, E2, and specific T1 zones within the Municipality for one year, during which time a review or study will be undertaken with respect to policies regarding the range, size and location of power generation facilities. The ICBL expires on March 30, 2010.

On September 29, 2009, the Ontario Power Authority (Power Authority) formally selected TransCanada’s bid to design and build an up to 900 MW combined cycle natural gas powered electricity generating plant in Oakville. This new natural gas power plant is to maintain local supply reliability and replace the coal-fired Lakeview generating station. TransCanada signed an agreement with the Power Authority to acquire land from Ford, based on land use permissions that existed when it submitted the Request for Proposals (RFP) to the Power Authority in early 2009.

Ford is the current owner of a six hectare site at 1500 Royal Windsor Drive, being Part Lots 6 and 7, Concession 3, SDS, and is ready to proceed with transferring ownership of this land to TransCanada, subject to conditions and a consent application. As shown on Exhibit 23, there are: a rail line to the south and west; industrial uses to the north and south of the proposed TransCanada site, with the latter straddling Cornwall Road; with residential uses further to the south.

Preliminaries

At the start of the hearing, a large number of citizens were in attendance as well as a number of media and television cameras. The hearing room could not accommodate the attendees. A new venue had to be found for this hearing.

The citizens were well organized, well informed and plainly against the power plant. However, this hearing was not to decide the merits of a power plant, only to decide on the appropriateness of OPA 296 and the ICBL.

Counsel advised the Board that cameras are not appropriate in Board hearings and Rule 91 of the OMB Rules of Practice and Procedures does not allow photos and electronic media at hearings. Media representative Daryl Konynenbelt requested that one camera be allowed in the proceedings. The Parties sought a ruling from the Board.

Mr. Swinkin, Counsel for Ford, told the Board that the public is not a Party to this hearing and members of the public were not granted Participant status at the Pre-Hearing Conference. They are not here to object to the ICBL. He suggested that a representative sample from the public could be heard at the appropriate time.

The Board adjourned to allow time for a more appropriate hearing venue to be found.

Upon reconvening the hearing in the Council Chamber, the Board ruled as follows:

- it will not permit TV cameras and electronic reporting in the hearing room while the hearing is in session, consistent with Rule 91 of the OMB Rules of Practice and Procedures. The media, however, can interview people outside of the hearing room if they wished and may record some of the exhibits during breaks.
- The public is welcome to attend the hearing and may select among themselves a small number of speakers to address the Board at the appropriate time.

The Hearing

At the outset, Mr. Doherty, Counsel for Oakville, advised the Board that current Official Plan policies only address publicly owned power generating facilities. With the Province now shifting to private power generating providers, many municipalities including Oakville, need to carefully review any issues and possible land use planning implications that may arise from these facilities. Insufficient information was given to Oakville by the power generation proponents and very limited time was allowed for Oakville to properly evaluate and respond to the Power Authority's procurement process

and site selection, which may have direct adverse impacts on the community. In fact, the Ford site was publicly identified only in September 2009.

To address these concerns, Council took the following action on March 30, 2009:

- Passed a By-law to adopt OPA 296 which prohibited power generating facilities with an energy production capacity greater than 10 MW, pending the review and development of more detailed criteria;
- Passed ICBL 2009-065 prohibiting power generation facilities with energy production capacity greater than 10 MW on lands zoned E1, E2, and specific T1 zones within the Municipality for one year; and
- Directed staff to undertake a study to determine location characteristics for private power generating facilities.

The study is now under way and the public consultation process is to follow in a timely fashion.

The Appellants see things differently and suggest that:

- The province has mandated the power plant at this location based on land use information available in early 2009;
- Oakville ignored signs that private power facilities are vital to fulfill obligations for power supply in SW GTA;
- Oakville should have acted earlier on its private power generation concerns, as there were other plants previously proposed and selected in the municipality and the adjoining area;
- OPA 296 is inconsistent with the provincial Policy Statement (PPS), the *Planning Act* and the Town of Oakville Official Plan (OP);
- OPA 296 is inconsistent with the PPS, specifically Policy 1.8.2, which states "Increased energy supply should be promoted by providing

opportunities for energy generation facilities to accommodate current and projected needs”;

- OPA 296 was adopted in haste and did not proceed through an adequate consultation process prior to adoption;
- There is no report or study establishing the need for the amendment;
- There is no need to undertake a review of power generation facilities because this matter is already addressed in Part C, Section 9.8 of the OP;
- ICBL 2009-065 is inconsistent with the PPS, specifically Policies 1.6.1, 1.7.1 and 1.8.2 (regarding infrastructure and services, long-term economic prosperity, and energy generation facilities) and is inconsistent with the OP, specifically Part C, Section 9.8 (regarding power facilities);
- No provision is made for current, ongoing studies and assessment of particular sites;
- OPA 296 and ICBL 2009-065 are prohibitory constraints and an impediment to proceed with the project as approved by the Power Authority and are not warranted for good land use planning.

The Board heard from three qualified and experienced land use planners: Diane Childs, Oakville’s Senior Policy Planner with some expertise in municipal planning and power plants; David Butler, Oakville’s consulting planner retained to assist the Town with respect to a Land Use Policy Study for Power Generation and Co-generation Facilities (the Study); and John Bousfield, the Appellants’ eminent consulting planner.

Phil Bouillon, Oakville’s Licensing and By-law Enforcement Manager, provided an analysis of the complaints emanating from existing industrial operations in the vicinity of the proposed TransCanada facility – Garfield Container, Ford, Millennium Waste and the CN Rail Yard, and how these complaints were resolved. Under cross examination, Mr. Bouillon concurred that there were no land use studies undertaken, no ICBL implemented, and no Official Plan Amendments enacted to deal with these complaints. The concerns were addressed by site plan measures. He also agreed that industrial

uses can be expected to create noise, odour and vibrations. The Ministry of the Environment (MOE) has a mandatory Certificate of Approval (COA) requirement to control environmental impacts and all industrial operations must comply.

John Mikkelsen is a registered professional engineer employed by TransCanada as the Business Development Project Manager on the Southwest GTA RFP and has extensive experience with the locating criteria of private power facilities. He dealt extensively with the technical aspects of the TransCanada proposal and specifically with Issue 9, *“Did the Town of Oakville take any reasonable steps to conduct policy studies with respect to power generation prior to 2009?”*

The Board also heard from four residents who passionately defended Oakville’s action at the special evening hearing of the Board, attended by more than 500 people:

- Ms Susan Hyatt spoke eloquently about health, environmental and social concern in the community and asked the Board to uphold the ICBL to allow the Town time to study the matter thoroughly;
- Mr. Dean Hurbert analyzed the issues and raised safety concerns;
- Mr. Bernard Krayne raised the concern that safety procedures for the plant and the community have not been addressed and the need to consider all the facts; and
- Ms Dorothy Tomiuk, a Mississauga resident, referred to the Clarkson air shed, raised health concerns, and carefully addressed the issues list, recommending the Board to uphold the ICBL and allow Oakville to proceed with the planning study.

The Evidence

Oakville

Ms Childs was the planning official in charge of the land use study and OPA 296. She was directly involved with the OPA and consulted with the staff planner who drafted

the ICBL. Both instruments apply to employment areas in Oakville (with some exceptions) and OPA 296 applies Town wide. It was her opinion that the municipality's role is to ensure a safe community and protect public health and safety – air quality, fire safety, and emergency issues. The proposed power plant is also an issue because of its size – 900 MW and the new gas-fired technology.

Ms Childs proffered that since the Province has changed the legislation on the way energy is to be generated and has turned over power generation to the private sector, there is a perceived loss of credibility in terms of accountability for public health and safety. Municipalities have to change the policy framework to better deal with this issue of public versus private power generation. Oakville's Official Plan (OP) policies on power generation were written before the *Power Generation Act*; are based on 1980's thinking and in her opinion deals with the distribution of power, not its generation by private enterprise. Further, she attested that the power generating plants' issue was not on the radar when Oakville did its five-year review of the Official Plan. The Zoning By-law also did not anticipate power generating facilities and does not list them as a permitted use. Although power generation may be considered to be an industrial use, the By-law's provisions were designed to permit government owned utilities to carry out power generation; it did not anticipate that private parties would do so.

Council was initially advised on January 12, 2009, by memo from the Director of Environmental Policy, of the power generation procurement process (Request for Qualification (RFQ) and Request for Proposals (RFP)) for the Southwest GTA (Exhibit 1, Tab 7A). Oakville staff identified concerns with the RFP process (the Air Quality Assessment – Technical Report of the Power Authority) and Council, on February 18, 2009, asked staff to keep informed and to request Halton Region Health Department to review the RFP. These concerns included the size of the plant (900 MW), impacts on the air shed and whether the Power Authority is required to comply with air emissions and other environmental issues; the proposed technology; and the shortness of time on comments to be received, analyzed and assessed by Oakville. Ms Childs estimated six months would be needed to carefully review and comment on the RFP process, where only one month was allowed.

In order to deal with these important public safety issues, Ms Childs opined that Oakville urgently needed to undertake a comprehensive planning study and public

consultation on this matter. On February 17, 2009, Council directed staff to develop Terms of Reference for a study of power generation facilities and to include the following aspects (Exhibit 1, Tab 7F):

- Current technologies and the range and types of power generation facilities operating or proposed under the Power Authority;
- PPS and emerging legislation which encourages the provision of renewable energy and need for increased energy supply;
- Evaluation of the impacts of the various types of power generation facilities;
- Development of location criteria;
- Best practices to address location impacts; and
- Policies to advance the potential for co-generation and renewable energy sources.

Section 38 of the *Planning Act* provides Council the authority to pass an ICBL to direct “that a review or study be undertaken in respect of land use planning policies in the municipality or in any defined area or areas”. This By-law is normally in effect for one year from the date of passing, but, Council may further amend the ICBL by extending its effect by one more year.

Council passed the ICBL on March 30, 2009 and retained The Butler Group Consultants Inc. (Butler Group) to conduct Data Collection Information and Literature Review (Phase 1) and Policy Analysis (Phase 2) of a four phase study. Planning staff are to complete Phase 3, Public and Stakeholder Input and Phase 4, Final Report and Official Plan Amendment. Although a report on Phases 1 and 2 was to be presented to Planning and Development Council in September 2009 by the consultants, the study had not progressed to the reporting stage at the time of the hearing in October 2009.

Ms Childs concluded that OPA 296 and the ICBL are warranted based on recent provincial legislation changes. Oakville needs to update its OP policies with respect to power generating plants. It is good planning and it is in the public interest. In her

opinion, the TransCanada power generating plant would be premature before the Town concludes its study.

Ms Childs also offered that should the Board decide to approve OPA 296 and the ICBL, it could exempt the TransCanada site from the restrictive requirements. She also proffered that it would help if the size of the power generating facility could be reduced. However, she did not offer an opinion on what would be a more appropriate power plant size.

Mr. Butler opined that there is sufficient rationale for both OPA 296 and the ICBL. He offered that the ICBL is needed to balance the public interest and private land rights; it must be used carefully; must conform to the OP; not be used in bad faith; be timely; and improve land use policy where there is deficiency.

He opined that Oakville needs to deal with any unknown effects of mid-size power plants in the QEW industrial corridor, i.e. air quality, health and safety and environmental concern. Emissions from this power plant need to be assessed in order to maintain air quality in the area. Because gas fired power plants are new and involve new technologies, Oakville has to study and address air quality issues and establish appropriate policies, zoning and site plan standards. These are legitimate land use concerns.

Space separation between sensitive uses is a particular concern. For example, space separation for renewable energy facilities in the province (wind and solar) has been increased from 300 m to 550 m. Mr. Butler asserted that 300 m distance separation for this plant from nearby residential, is not sufficient for air quality, health and safety in the QEW industrial corridor, because of the cumulative industrial and highway pollution that already exists. In this case, Mr. Butler suggested that public health and safety concerns have not been addressed by the proponent; there has been no consultation with Oakville staff; and there have been no reports or environmental information submitted to substantiate the project. He suggested that there is a disconnect between the environmental screening process and the planning process and it would be helpful if Oakville had received the complete environmental review of the project.

With respect to the issue of private versus public ownership of power stations, Mr. Butler opined that it is a planning issue because private facilities other than those subject to the *Green Energy and Green Economy Act* (GEGEA), are not exempt from the provisions of the *Planning Act* and require municipal approvals and permits for construction. There is also a requirement for municipal services for such facilities. Therefore there may be land use impacts that affect municipalities.

Mr. Butler opined that the ICBL is required to give Oakville breathing space to develop a checklist of criteria to determine where an optimal location for these facilities would be, in order to protect the public interest. There is strong municipal concern and obligation to address the public safety concerns in the short term. Before the study is completed, a site specific OPA would be required for this development.

In his opinion, the ICBL conforms to the PPS, because it is temporary, until Oakville develops regulations that could deal with air quality through appropriate land use and development regulations. It conforms to the Halton OP, which directs municipalities to pay attention to existing policies "...to minimize adverse impacts caused by its (energy) production", including health and safety, which can be addressed by guidelines for distance separation. Both OPA 296 and the ICBL are warranted to deal with this very complex matter. It represents good planning and is in the public interest.

The purpose of the OPA was to authorize a study. However, under cross examination Mr. Butler opined that Council does not require an OPA to engage a study. Further, he concluded that OPA 296 would prevent the establishment of the power station at this time and would possibly frustrate the process.

Although Mr. Butler opined the TransCanada power plant site should not be exempted from OPA 296 and the ICBL, under cross examination he offered that there would be no issue if the Board decided to exempt the site. However, he suggested the Board should allow the OPA and ICBL to remain in effect, in order to complete the study, so that the significant concerns can be dealt with. The study could be ready by the end of 2009 and the ICBL expires in March 2010.

TransCanada

Mr. Mikkelsen testified that TransCanada had consulted with Oakville, both at the political and the staff levels since 2008, and offered a list of activities and meetings itemized in Exhibit 16. In July 2009, they had a site plan pre-consultation with staff, but an application had not yet been submitted. They are also working on developing engineering studies and designs for the plant. He asserted that both an Environmental Review Report and Certificate of Approval from the MOE are required and these processes, which come under the *Environmental Protection Act*, will address, in detail, any environmental concerns.

Mr. Mikkelsen advised the Board that power generating facilities such as the Oakville one are constrained in terms of location. They need to be close to the high voltage grid. The Oakville Transfer Station in this case is situated about 400 m to the east of the proposed site and has a maximum capacity of 900 MW. This therefore establishes and limits the size of the plant.

Mr. Mikkelsen also opined that the TransCanada plant is further constrained in terms of time. It must be in operation by the end of 2013, as per the contractual agreement with the Power Authority, which is endorsed by the Minister of Energy. Because this is a one-of plant, it also requires its own engineering design, and large parts and materials would have to be shipped by water, which is constrained by the weather. This short timeframe, combined with the uncertainties and delays imposed by OPA 296 and the ICBL, place the project in serious jeopardy.

Mr. Bousfield provided extensive details of the power plant and its operation and a comprehensive review of the planning process. He submitted that one of the RFP specifications is that the plant must connect to the existing circuitry. There is an underground connection to the 230 KV transmission line that is close to the Ford site. There is also an underground water pipe connection to Lake Ontario, constructed by Ford, which pumps water to the site and takes outflow to the lake. The TransCanada bid was based on planning permissions being in place.

With respect to residents' concerns, Mr. Bousfield opined that there are existing residential uses just over 400 m from the industrial site; therefore, the site meets the sensitive use distance separation criteria in the MOE Guidelines. Emission standards

for the new plant are stricter than what is currently required by the MOE. TransCanada will meet or exceed these standards, through the use of gas turbines that are among the most efficient available.

With respect to the ICBL, Mr. Bousfield opined that it should only be used when a municipality is confronted with a possibility of a land use event perceived to not be in the public interest. Power supply is in the public interest; therefore, an ICBL is not an appropriate land use control instrument in this case. Its reach is too broad. It should have been more specific. Prospects for another large power generating facility in the area do not exist. If the central issue was air quality and public health, Oakville should have waited to find out more details from the Environmental Review before taking such drastic action.

Mr. Bousfield agrees the Butler Study will produce recommendations that will be in the public interest. However, in his opinion, there is a larger public interest for the SW GTA to meet the power demand as has been determined by the Power Authority. He cautioned that any municipal result should not be allowed to negate the power plant that would be supported by the Environmental Review and be acceptable to the MOE.

OPA 296 was a surprise to TransCanada. Mr. Bousfield opined it isn't necessary for Council to pass an OPA to support an ICBL. He noted that OPA 296 is flawed in that it has no time limitation and it is being used as a prohibitory regulation; it refers to an "interim" policy that is not authorized by the *Planning Act*; and provides no explanation of what is the concern with "private" power generation.

In his opinion, OPA 296 does not conform to the Growth Plan because it frustrates the Province's objectives to provide energy supply in the GTA; it is not consistent with the Halton Region Official Plan; it is not consistent with the PPS because it is HOW a project should proceed, not by WHOM. It should not matter whether the ownership of the facility is public or private, because electric power is a public good. Therefore, there is no rationale for changing the policy.

Further, Mr. Bousfield opined OPA 296 and the ICBL do not have regard to s. 2 of the *Planning Act*. The Province goes through extensive efforts to ensure public safety. There is a Provincial interest that will ensure the project meets and exceeds all

standards of the *Environmental Protection Act* and the *Environmental Assessment Act*. The MOE sets strict limits for air quality and a COA will be required for this facility.

Further to this, Mr. Bousfield suggested the ICBL tried to amend the By-law incorrectly. There were some technical incongruities identified with the drafting of the ICBL sections 2 and 4, which refer to s. 42 of the *Planning Act*. In his opinion, an ICBL stands beside the Zoning By-law; it does not amend it. Any changes can come under a s. 34 process.

Mr. Bousfield agreed that an exemption of the site from the ICBL and OPA 296 would satisfy TransCanada's interests. However, he was very forthright that the Town did not need to have approval of either document to enable it to do the study and it would, in fact, be wasting their ICBL potential for other issues. He reiterated: The technology is not new. Other municipalities have similar power plants and they did not pass an ICBL or an OPA to delay the process. Since the municipality's motives relate to the Clarkson air-shed, air quality improvements have been considered by the Province and the Ministry of Health has found no impact would result from this plant. Neither of these instruments can influence the impact of pollutants that come to this area from the US Midwest, the QEW and Highway 403.

He advised the Board to allow the appeals and not approve OPA 296 and ICBL 2009-065.

DISCUSSION

The Minister's Approval

The Minister of Energy and Infrastructure's August 18, 2008, approval letter for the TransCanada power plant, is found in Exhibit 14, Tab 22. This approval poses two issues. First, in this approval, the Minister states:

As with all electricity generation projects procured by the OPA (Power Authority), the facility selected under this process shall be required to undergo all local,

municipal and environmental approvals to ensure it meets or exceeds required standards, including those of air quality, noise, odour and vibration.

The Parties presented differing positions as to the obligations of TransCanada to undergo all municipal applications. The Appellants suggest that the Minister relied on the information in the RFP that indicated planning and zoning were in place. They will be submitting a consent application to sever the land from the Ford plant and they are working to develop a site plan application for submission to the Town. Further, the environmental review is in progress and will address the stringent requirements of the MOE. In these respects, the opinion was that they concur with the Minister's letter with respect to municipal approvals.

The Town points to the statement "...shall be required to undergo all local, municipal and environmental approvals..." as meaning TransCanada must meet the *Planning Act* requirements and must submit an Official Plan Amendment application if it wishes to proceed before the study is completed. I will discuss this further in the following sections.

Second, the Minister also may have placed an inordinate expectation in his approval of this plant by stating "...the facility will have an in-service date not later than December 31, 2013." Assuming that the environmental studies are well under way and can be completed in the near future, meeting the planning approvals (if needed), i.e. Official Plan Amendment, rezoning, site plan, consent applications and building permit approvals within the time frame set by the Minister may prove to be too onerous. Failure to meet this ambitious completion time would be very expensive, according to Mr. Mikkelsen. He accepted, under cross examination, that TransCanada is aware of and accepts the risks associated with the development approval process and the process remains to be completed.

What seems to be odd to the Board however, is that the Minister did not consider this ICBL and OPA 296 to be a matter of provincial interest that could adversely affect the appellant's power plant and did not advise the Board of any such interest or conflict pursuant to s. 17(51) of the *Planning Act*. No witness from the Provincial power authorities was called by the Appellants to give evidence to the Board. Mr. Bousfield in fact accepted that "someone" had underestimated the planning process time frame.

In the absence of evidence from Provincial or Power Authority staff, the Board has determined to proceed to consider the merits of the appeals of Oakville's planning instruments based on the evidence before it.

The Interim Control By-law

What is before the Board is the question of the appropriateness of OPA 296 and of ICBL No. 2009-065. Subsection 38(1) of the *Planning Act* authorizes Council to pass ICBL to temporarily restrict property rights while the municipality undertakes a review or study of land use policies and zoning regulations within a defined area. S. 38(1) reads as follows:

Where the council of a local municipality has, by by-law or resolution, directed that a review or study be undertaken in respect of land use planning policies in the municipality or in any defined area or areas thereof, the council of the municipality may pass a by-law (hereinafter referred to as an interim control by-law) to be in effect for a period of time specified in the by-law, which period shall not exceed one year from the date of the passing of the by-law thereof, prohibiting the use of land, buildings or structures within the municipality or within a defined area or areas thereof for, such purposes as are set out in the by-law.

Under s. 38 of the *Planning Act*, the municipality is not required to hold a public meeting or to give notice of its intentions to pass an ICBL. The only legislated condition that has to be met is that Council must direct a review or study is to be undertaken of the requisite land use policies of the municipality (*Equity Waste Management of Canada et al. and the Corporation of the Town of Halton*). Oakville has complied with this condition. It has retained The Butler Group to undertake the study and the evidence was that the study is well under way.

The Board finds that Oakville had a legitimate planning reason to resort to this action. It identified early in 2009, that there was the possibility of a large, privately operated power generating facility being contemplated in the vicinity of Oakville. The actual Ford site was not made known to Oakville as a candidate site until March 2009, just before Council passed the ICBL and OPA 296, on March 30 of 2009, and it was not chosen by the Power Authority until September 25, 2009. TransCanada was not initially identified as a proponent and it kept much of its interest and the site selection

information confidential. In the absence of a confirmation of the site and comprehensive and relevant information on the power plant being anticipated in the area, Oakville had a reasonable apprehension of a specific land use problem or problems related to, among other things, air quality and public health, and it decided to deal with them, in the public interest. The courts have recognized in *715113 Ontario Inc. v. Ottawa (City)*, *supra* at 556 that protecting the public interest takes precedent over the rights of affected landowners to use their land, when an ICBL is duly passed. The *Planning Act* gives municipal councils the authority and the responsibility to determine and define the public interest.

There was no compelling evidence that Council acted irrationally or arbitrarily in passing the ICBL. The allegations by the Appellants that Oakville should have seen the “train coming” and should have acted well before 2009 to amend its OP with respect to power generating plants, does not cut muster. Whether or not Oakville had discussed policies on energy generation before TransCanada came into the picture does not compel the municipality to have completed a study earlier. The Court of Appeal in the Equity Waste Decision has ruled that interim control by-laws are to be given a fair, large and liberal interpretation to allow a municipality to "rethink" its land use policies. The whole purpose of the ICB is to provide the municipality with time to undertake the study that will underpin whether there should be further changes to the OP or the zoning by-law. All Counsel provided extensive case law dealing with this matter.

The Town of Oakville is not in the power generation business and can thus not be expected to be as well versed and keep abreast of the many provincial legislative changes relating to power generation that have taken place over the past decade. This is only one of many public policy areas the municipality needs to address in its OP, and Oakville recognized that its current policies were in need of review and update. The alleged lack of or limited openness and transparency of TransCanada in sharing vital information with Oakville can only accentuate mistrust and apprehension by the municipality and the public.

Although Mr. Smiley in his argument elevated planning and planners to a high pedestal, because he suggested they are supposed to be forward looking and future oriented, and should have seen this issue coming, the fact is that planning is sometimes a reactive art or practice. This is evident by the many and routinely passed OP and

zoning amendments and interim control By-laws initiated by municipalities attempting to address specific issues, just as they arise and are in Council's opinion in the public interest.

The fact that there was the CMS power plant proposed that failed a few years ago in the northern rural extremities of the Town, in the Parkway Belt, was not considered by Oakville to be a reason for it to have previously considered the types of land use policies that may be more appropriate in the narrow QEW Employment Corridor where the TransCanada site is located, which is also close to residential. Another reason cited by Oakville in its defense for not having previously considered OP policies, was that with the Sithe Southdown power plant site in Mississauga, approved in 2001 (but did not proceed to construction), just east of the Oakville boundary, gave it some false assurance that a power plant would not locate in Oakville.

With respect to the public interest issue, the Board is cognizant that there are several "public interests" involved in this matter. There is the local interest of the surrounding community that would be directly affected by a development such as a power plant. There is the municipal interest, which has land use control on an affected area and has the moral and legal responsibility to maintain among other things, public health and safety of the inhabitants. There is a broader, regional interest, the SW GTA in this case and the need for electricity to maintain employment, commerce and the normal lifestyle of residents.

There is the Provincial interest in terms of overall energy planning for the prosperity of the region and the Province. The Ontario Power Authority (which has taken over Ontario Hydro) is the central power planner in the Province and its mandate is to provide a reliable electricity system in Ontario. Its role is also to prescribe where power generation is to be situated and to provide for the distribution of energy. The Province promotes energy conservation and the use of clean energy sources such as natural gas. Oakville and the SW GTA will require additional power supply as a result of the closing of coal generating plants, to reduce air pollution. This is also a broad public interest.

There is also the environmental interest and the need for clean air and public safety as perceived by the community. Although no environmental evidence was

presented by the Parties and the Board takes no position in this matter, it is worth noting that the September 12, 2009, Ministry of Health letter to the Peel Medical Officer of Health copied to Halton Region Health Department (Exhibit 12), with respect to concerns raised about the ambient air quality in the Clarkson area as a result of the proposed gas fired generating plant, concluded that the addition of this plant would not contribute to a greater risk of public health impacts. However, the Chief Medical Officer of Health further noted that a more detailed assessment of potential impacts will be done before the MOE issues its final approval for the plant.

All these public interests coexist within a fine balance in our society. Therefore, special care must be taken by the municipality to ensure that one 'special' "public interest" does not unfairly prevail over another "public interest" in the OP and Zoning regulations to be developed. Mr. Butler concurred that the provision of energy generation facilities should be examined in the broader municipal planning framework and the mandate of the Power Authority "has to be balanced equally along with all matters of Provincial Interest".

Oakville is aware that by enacting this ICBL over a wide area of the Town, they forego the opportunity to address any other issues that may arise over the next few years. However, Council believes this issue to be significant enough to warrant the risk.

The Board cannot stop a municipality from undertaking further studies to determine how it wishes to assess particular land uses now and in the future. Council has the authority to direct a study or studies to provide or update policies in the OP. Although it is not necessary to have an OPA and an ICBL enacted to do a study, Council has the authority under the *Planning Act* to pass ICBL to freeze development for a short period of time (maximum of two years), while it studies an important issue or concern such as public health and safety, renewable energy, current technologies and develops location criteria for power plants. Ms Childs indicated that staff will be working hard to have policies and recommendations before Council for consideration and adoption before the March 30, 2010 expiry of the ICBL.

Since under ICBL private property and development rights are not extinguished but only temporarily suspended, and the Board having heard no compelling evidence and having no reason to believe that Oakville will be seeking to prohibit outright the

TransCanada power plant at its intended location, which would be contrary to the PPS, the Board will allow ICBL 2009-065 to proceed, to permit the municipality to expeditiously complete its planning studies and determine appropriate land use policies and zoning controls for power stations. The Board is also satisfied that the ICBL conforms to the Regional Official Plan which, according to Mr. Butler, directs municipalities to pay attention to existing policies "...to minimize adverse impacts caused by its (energy) production", including health and safety, which can be addressed by guidelines for distance separation.

As a side note however, and in recognition that there is a significant time constraint for TransCanada to complete the power plant by the end of 2013, the Board would urge Oakville to have due consideration to the broader public interest in the SW GTA and the PPS direction for the availability of electric power, and to minimize any adverse impact on the legitimate expectations of a land owner (Ford and TransCanada), when it decides its policy path and zoning regulations for this plant.

OPA 296

The municipality purported that it had been earnestly reviewing and revising its new OP to meet the Provincial deadlines with respect to the Growth Plan by preparing The Livable Oakville Plan (which is approved by Oakville, but not yet adopted by Halton) and had very limited time to deal with power generation issues. Although Oakville would like to "require all new major energy generation facilities in excess of ten megawatts to obtain an Official Plan amendment", this policy is not in effect at this time. Thus Oakville justifies the need for OPA 296.

However, the situation with OPA 296 is not very clear or convincing why it was required to be introduced concurrent with the ICBL. The March 16, 2009, staff report (Exhibit 1, Tab 7F, page 188A) states that the policies in Part C section 9.8 of the OP "...do not distinguish between public and private facilities, and could be interpreted to mean that power generating facilities are permitted throughout Oakville". This is puzzling, since Ms Childs' March 16, 2009, report states "...it is highly unlikely that such a facility would be proposed" in the residential and commercial areas. Under cross examination she also accepted that the Ford site is designated Industrial and the E2

(Heavy Industrial) zone in the Zoning By-law can be interpreted to allow manufacturing processes on this site, and power generation could be considered such a use.

To understand this better, one must examine the wording of the Policy, which states:

9.8 Oakville recognizes that pipeline rights-of-way and all existing electric power facilities and the development of any new electric power facilities, including all works as defined in the *Power Corporation Act*, such as transmission lines, transformer stations, and distribution stations, shall be permitted throughout the Planning Area, provided that such development satisfies the provisions of the *Environmental Assessment Act*, including regulations made under the *Act*, and any other relevant statutes. (The emphasis is by the Board).

The policy clearly speaks of “the development of any new electric power facilities”. Would this not include a power generating station? The policy does not explicitly exclude power plants, nor is it limited to the “transmission of power”, as Ms Childs suggested. There is also nothing differentiating “public” from “private” utilities. After all, is electricity not a public good, notwithstanding who generates it?

According to the evidence, there appears to be an onerous regime of regulations demanded by the Ministry of the Environment (MOE), the *Environmental Assessment Act* and the *Environmental Protection Act*, including sound, particulate air quality assessments among others. Any new power generating facility must meet MOE’s regulations and also obtain a Certificate of Approval (COA) before it can start operations. TransCanada would have to provide these studies and reports before it could start its operations. Given the strict and onerous environmental and operating requirements of power plants imposed by the MOE, it would be difficult for the Board to differentiate on the question of WHO produces the power. It remains to be explained in Oakville’s study: how “private” utilities represent “...a decrease in direct public accountability”, as stated in Council’s February 17, 2009 resolution.

Oakville’s witnesses sounded some considerable frustration (previously discussed in this decision) that TransCanada’s Environmental Review studies were not made available to them for review and somehow this was unduly delaying the Butler Group Study. Mr. Mikkelsen advised in reply, that the studies were under way and the TransCanada bid was only recently approved. It would not have been prudent for TransCanada to have prepared these detailed studies in advance. It will make them

available to Oakville when they are completed. Mr. Bousfield also concurred that this information should be shared with Oakville when it is available.

It would seem to make ample sense to the Board that there be coordination and sharing of information between the Town and TransCanada, if time is of the essence and this process is to proceed in a timely fashion. I would urge the Parties to open channels of communication and share whatever information is needed. Although there may be conflicting or competing public interests at play, there is only one public that must be served in a fair, open and transparent fashion.

Three experienced planners have advised the Board that it may exempt this 900 MW power plant from the provisions of OPA 296 (and the ICBL). Should the Board accept this advice, the following question arises: Is there a reason for OPA 296 to continue to be in effect? OPA 296 permits power plants smaller than 10 MW and there is no restriction on their numbers. The Board was advised that these power plants have no requirements for environmental review and no other restrictions seem to apply. The Board did not hear any evidence that there is a probability for another large power plant to develop in the Oakville area. In fact, two of the planners agreed there is no potential for another mid size plant in the area. Therefore, one must ask, what purpose would OPA 296 serve if the TransCanada site is exempted?

The ICBL provides for a study of power plants and related matters, which is under way. The ICBL also restricts power plants larger than 10 MW from developing, until the study is completed and more appropriate OP policies and zoning regulations are enacted.

The Board has carefully considered the evidence and has had due regard for Council's ample caution in this matter, and it has allowed the ICBL to proceed. However, should the Board find it appropriate to exempt the TransCanada power plant from the provisions of OPA 296, which it does, it also finds little justification in keeping the OPA intact.

The Board is satisfied that the current Oakville OP policies relevant to power facilities are sufficient in addressing the present situation and particularly the proposed TransCanada power plant. It is clear they are broad and can accommodate power generating facilities, and they are consistent with the PPS with respect to policy 1.8.1:

providing opportunities for energy generating facilities and promoting energy supply. TransCanada relied on these same policies when it submitted its RFP to the Power Authority, and the Minister, in approving the TransCanada power plant proposal, relied on the planning information relevant at the time of the submission. The Board sees no ambiguity in this direction. Mr. Butler concurred with this (Exhibit 7, page 5). It is therefore difficult to justify the benefit of adopting OPA 296 to limit power generating facilities to a maximum of 10 MW in Oakville for an undefined time frame. For these reasons, the Board considers OPA 296 to be premature.

Ms Childs opined under cross examination that TransCanada could in the interim apply for an OPA, but she also stated in chief that such application would not be accepted because it would be premature. On this basis, the Board would tend to agree with the Appellants' apprehension that Oakville's underlying intent in adopting OPA 296 seems to be an attempt to hinder the proposed TransCanada power plant and frustrate its timely development, requiring, at the very least, an onerous Official Plan Amendment at some unspecified period of time. This is inconsistent with the pre March 30, 2009 planning regime and it will have a detrimental impact on the development of the power plant.

The Board will therefore not allow OPA 296. It was not supported by a sufficient in detail land use study or justification. Oakville's objectives can be comfortably achieved by the planning study that is currently in progress and any new planning policies can be incorporated in the OP at a later time. There is no public benefit in having restrictive "interim" policies as suggested in OPA 296, while the land use study is in progress and an ICBL is in effect. There is no authority for "interim" OP policies in the *Planning Act*.

Drafting Error and Correction of ICBL

The appellants identified a technical error in the ICBL, which according to Ms Childs was in the consolidated mapping that identifies the extent of the lands affected by the By-law. Mr. Bousfield suggested the ICBL appears to amend the Town's Zoning By-law 1984-63, which is an invalid approach. Mr. Doherty accepted this incongruity and requested the Board to exercise its power to amend the By-law under s. 34(26),

which is incorporated by reference in s. 38(5) of the *Planning Act*. This would entail deleting s. 2 and s. 4 and part of s. 6 of the ICBL containing the words "...and Schedules B-1 to B-14 inclusive". The Board will do so.

The Board will allow the appeal in part in order to amend the schedules in the ICBL.

DISPOSITION

THE BOARD ORDERS that the appeals of Ford Motor Company of Canada Limited and TransCanada Energy Ltd. under subsection 17(24) of the *Planning Act*, R.S.O. 1990, C. P. 13, as amended, are allowed and Amendment 296 of the Town of Oakville Official Plan is not approved.

AND THE BOARD ORDERS that the appeals of Ford Motor Company of Canada Limited and TransCanada Energy Ltd. under subsection 38(4) of the *Planning Act*, R.S.O. 1990, C. P. 13, as amended, against the Town of Oakville Interim Control By-law No. 2009-065, are allowed in part, and By-law No. 2009-065 is amended by deleting s. 2 and s. 4 and part of s. 6 containing the words "...and Schedules B-1 to B-14 inclusive". In all other respects, the Board Orders the appeals are dismissed.

The Board so orders.

"Aristotle Christou"

ARISTOTLE CHRISTOU
MEMBER