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A Full Range of Housing: Recent Developments in Protecting Rental Housing Stock under Municipal Planning Policies

Toby Young*

Résumé
La transformation et la démolition du parc de logement locatif rongent l’approvisionnement de logement abordable pour les Ontariens à revenu faible et modéré. La responsabilité d’assurer un approvisionnement suffisant de logement locatif pour les résidents actuels et futurs, occupe une très haute priorité auprès des municipalités qui se préoccupent de leur devoir de mettre à la disposition de leurs collectivités une gamme variée d’habitations. La préservation et la création de parc de logement locatif ont continué à dominer les politiques des municipalités ontariennes, tout particulièrement des municipalités avec des populations locatives importantes. Cependant, la proclamation de la Loi sur la protection des locataires en 1998 (et l’abrogation de la Loi sur la protection des logements locatifs), a offert une occasion aux promoteurs immobiliers de contester le pouvoir des municipalités de protéger leurs parcs de logements locatifs à travers leurs politiques officielles sur l’urbanisme.

Dans le cas Toronto (City) v. Goldlist Properties Inc., la Cour d’appel de l’Ontario a confirmé que les municipalités conservaient leur autorité statutaire, conférée par la Loi sur l’aménagement du territoire, de mettre en vigueur des politiques pour protéger les logements locatifs. Soulignant l’importance d’une interprétation étendue des pouvoirs municipaux, la Cour a éclairci le point que l’aménagement officiel ne se limite pas seulement à l’aspect purement physique de l’aménagement du territoire, mais inclut aussi des dimensions socio-économiques. De surcroît, la Loi sur la protection des locataires ne donne aucunement le droit de transformer ou de démolir des immeubles locatifs. Cependant, les décisions municipales en matière d’urbanisme continuent à être susceptibles de révision par la Commission des affaires municipales de l’Ontario, le tribunal de la province qui passe en revue les décisions sur l’urbanisme. Une décision récente de la Commission, autorisant la transformation de 500 unités, situées dans le centre ville de Toronto, – et qui pourtant avaient été construites tout spécialement pour la location – en des condominiums d’appartements, suggère que les politiques sur le logement locatif vont être soumises à des interprétations strictes, basées sur l’engagement primordial de la Commission, qui est de privilégier les intérêts de la

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propriété privée. Cette approche de la Commission, dans un contexte de déficit continue de nouvelles habitations locatives abordables, ne fait que contribuer à l'épuisement du parc de logements locatifs et à une pénurie grave possible d'unités pour les locataires de l'Ontario.

INTRODUCTION
In June 1998, with the proclamation of the Tenant Protection Act, 1997 (TPA) and the repeal of the Rental Housing Protection Act (RHPA), Ontario's tenants faced a new residential tenancy regime that, at first instance, appeared to afford less protection from the potential loss of rental residential housing stock. The advent of the TPA was characterized by some groups as a clear policy shift from the protection of existing rental units to the protection of existing tenants and the removal of the discretionary power of municipalities to control demolitions and conversions. In fact, this apparent shift in legislative focus was reflected, to some extent, in the provincial government's discussion paper released prior to the TPA, which noted that demolitions, major renovations and conversions of rental buildings to condominium would no longer require municipal approval.3

The prospect of any reduction to their rental housing stock concerned municipalities, particularly those larger municipalities with sizeable tenant populations requiring an adequate supply of housing stock. In Ontario's larger municipalities, the conventional rental housing market most affected by the proposed legislative reforms, constitutes the bulk of the available rental housing stock. Furthermore, tenants households make up almost one-third of all households in Ontario, and in Toronto, slightly less than one-half of all households rent their homes.6

2. R.S.O. 1990, c. R.24. Section 219 of the TPA repealed the RHPA.
3. The paper, prepared by the Progressive Conservative government, was entitled, “New Directions for Discussion: Tenant Protection Legislation” (Toronto: Queen’s Printer, 1996), at 10–11. The claim that the TPA shifted the focus to existing tenants was based primarily on the new provisions for security of tenure for tenants who occupied the unit at the time of the conversion and for compensation for evicted tenants. See infra note 68 at 23.
4. In Toronto, conventional (or permanent) rental housing in the private or social housing sectors constitutes about 75% of the rental housing stock. The remaining 25% are in the secondary rental market (or more temporary housing, in the sense that it can more readily revert to owner-occupation), such as rented houses, duplexes, second suites in houses, apartments over stores, and rented condominium units: The Toronto Report Card on Housing and Homelessness, 2003 [unpublished] [Report Card 2003], App. A, at 21.
5. In 2001, 32% of all households in Ontario were renters, or 1,351,365 out of 4,219,410 households. See Statistics Canada, Structural Type of Dwelling (9) and Tenure (4) for Occupied Private Dwellings, for Canada, Provinces, Territories, Census Metropolitan Areas and Census Agglomerations, 2001 – 20% Sample Data (Ottawa: Statistics Canada, October 22, 2002. 2001 Census of Canada. Catalogue no. 95F0321XCB01004).
From the perspective of municipalities, concerned about the planned growth of their communities, a full range of housing, including sufficient rental housing, provides a diversity of housing options for both current and future residents and provides a measure of social and economic stability for a city’s population. In particular, where vacancy rates are low, prospective tenants are unable to find suitable accommodation at a fair market rent and existing rental households have limited access to other accommodation should their financial position or housing requirements change.

In order to protect their rental housing stock, municipalities have implemented housing policies in their Official Plans, setting out planning goals to guide future land use for housing and, from time to time, amending these plans to reflect changing circumstances. Most prominently, in April 1999, following the repeal of the RHPA, the City of Toronto adopted an Official Plan amendment [OPA No. 2] to encourage new rental housing production and to address the loss of rental units throughout the newly amalgamated City. The City was particularly concerned about the availability of rental housing for moderate- to low-income households.

However, landlord advocates viewed OPA No. 2 as nothing less than an attempt by the City to replace their powers under the RHPA, and various parties—including property owners, developers, and associations of owners of rental residential property [developers]—appealed OPA No. 2 to the Ontario Municipal Board [Board]. On a preliminary motion before the Board, prior to any determination of OPA No. 2's planning merits, the developers argued that OPA No. 2 was illegal and invalid and that the Board had no jurisdiction to approve it, regardless of its merits. The Board agreed, finding OPA No. 2 to be illegal and invalid on the grounds that it was unauthorized by the Planning Act and was in conflict with the TPA. The City appealed to the

7. Section 2 of the Planning Act requires that a decision maker, including the Ontario Municipal Board, in carrying out its responsibilities under the Planning Act, have regard to "matters of provincial interest such as ... (j) the adequate provision of a full range of housing."
8. Although there are problems with the reliability and scope of vacancy rate data, it is generally accepted that a healthy, balanced vacancy rate is between 2% and 3%.
10. OPA No. 2 amended the former Municipality of Metropolitan Toronto Official Plan [Metro-Plan].
12. R.S.O. 1990, c. P.13, as am.
13. Supra note 11 at para. 43.
Divisional Court, where the decision of the Board was overturned, and, shortly thereafter, leave to appeal to the Court of Appeal was granted to the developers.

This paper first examines the recent decision of the Court of Appeal in *Toronto (City) v. Goldlist Properties Inc.* [Goldlist],\(^\text{14}\) which confirmed that municipalities have the power to enact Official Plan policies preserving rental housing. *Goldlist* also confirmed that the TPA's purpose is to protect tenants and does not bestow any new rights for developers to demolish or convert rental housing. Second, this paper considers the role of the Board on an appeal from a refusal to allow a conversion of rental housing, because ultimately, where the City refuses a development application, it is the Board that determines whether a proposed conversion is consistent with applicable housing policies. Furthermore, to provide some insight into how the Board approaches and interprets rental housing protection policies, this paper reviews a recent decision of the Board analyzing housing policies in a developer's application for conversion to condominium.\(^\text{15}\) Finally, this paper offers some concluding remarks on the application of the City's rental housing policies in the context of the current rental housing market in Toronto.

**Adoption of OPA No. 2**

Following amalgamation in 1998, Toronto City Council initiated a process to update and harmonize the city's rental housing policies. The existing stock of conventional rental housing was being eroded by applications to demolish or convert to condominium,\(^\text{16}\) and new supply was not forthcoming from the private sector, which had completed only a negligible number of new units.\(^\text{17}\) This process sought to build on the Official Plan policies that were in place in many of the former area municipalities, and, in this regard, the City of Toronto was not alone, as other municipalities had also adopted policies under their official plans to preserve rental housing.\(^\text{18}\)

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\(^{16}\) Since the repeal of the RHPA in 1998, there have been nine applications to demolish a total of 1,340 units for site redevelopment. Currently, there are five applications involving 1,703 rental units that have been rejected by the City and subsequently appealed to the Board. See *supra* note 4 Report Card 2003, App. A, at 25.

\(^{17}\) From 2000 to 2002, only 3% of new housing construction was for rental units (873 units), of which only 240 were purpose-built, compared to 97% for the home-ownership market (28,492). At the same time, the loss of existing units means that there is less rental housing in Toronto now than in 1996. See *supra* note 4 Report Card 2003 at 7.

\(^{18}\) Prior to the enactment of the RHPA in 1986, the former cities of Toronto, North York, and Scarborough had adopted Official Plan policies on the conversion of rental units to condominiums. In addition, the municipalities of Mississauga, Windsor, Ottawa-Carleton, and Durham had also adopted policies protecting their supply of rental units and limiting the conversion of rental units to condominiums by tying the conversion to a vacancy rate. See *infra* note 27 at 236, paras. 5, 6.
On 15 April 1999 the City of Toronto adopted OPA No. 2. The objectives of OPA No. 2 were threefold:

1. to encourage the retention of existing rental housing and the creation of new rental housing;
2. to seek the replacement of rental units in cases where a developer applied to redevelop a property that involved the demolition of existing rental units while also requesting planning approvals; and
3. to identify the specific conditions under which the condominium conversion of rental apartment buildings could take place.

The general policy approach of OPA no. 2 is articulated in section 135.1:

135.1 to preserve, maintain and replenish the supply of residential buildings, and particularly rental buildings, across the City of Toronto by restricting the demolition of residential property and the conversion of rental units to condominium, and/or freehold, by discouraging the conversion of rental units to equity co-operative, and by encouraging new rental housing production.

The specific policies of OPA No. 2 on condominium conversion link conversions to a vacancy rate threshold:

135.2 to restrict the conversion to condominium of any building, or any related group of buildings, including non-profit co-operative and/or equity co-operative, containing six or more rented residential units as it would be premature and not in the public interest, unless the vacancy rate in the City of Toronto, as reported by Canada Mortgage and Housing Corporation, for private rental apartments and townhouses, respectively, has been at or above 2.5 per cent for the preceding two year reporting period.

135.3 (a) despite policies 135.1, 135.2 and 135.4, to consider allowing the conversion of buildings containing six or more rented residential units only where:

(i) the rents that were actually charged for each unit in the building or related group of buildings one year prior to the application, were at or above the average high-end rent level by unit type as prescribed by Council from time to time, and based on Canada Mortgage and Housing Corporation reports; and


20. OPA No. 2 does not address the demolition of rental housing where a developer does not require planning approval for an increase in height and/or density. In order to address demolitions that did not require planning approval, the City of Toronto proposed a private bill, Bill Pr22, An Act Respecting the City of Toronto (Rental Housing Units). Bill Pr22 would have permitted redevelopment of rental housing sites subject to replacement of any units to be demolished, whether or not a rezoning was needed to permit the development. Bill Pr22 received first reading in December 2001 but was later removed from the Order Paper by the Progressive Conservative government.
(ii) at least 66 per cent of the tenanted households have expressed their support in writing for the conversion application in a manner prescribed by Council; or

(b) despite policies 135.1, 135.2 and 135.4, to consider allowing the conversion of equity co-operative buildings containing six or more rented residential units where:

(i) the co-operative was legally created prior to June 17, 1998;
(ii) 50 per cent or less of the units are tenanted;
(iii) 66 per cent of each of the tenant and shareholder households have expressed their support in writing for the conversion application in a manner prescribed by Council; and
(iv) an application for condominium approval under the Planning Act has been made by the equity co-operative corporation within 2 years following approval of this policy [emphasis added].

With regard to demolitions, OPA No. 2 emphasizes the need to retain units, unless the building is structurally unsound, and to seek the replacement of any demolished units in the new development:

135.4 to seek the retention of rented residential units, except where the whole or part of a building which contains such units is in the opinion of the Chief Building Official structurally unsound, and to consider, where appropriate, acquiring or leasing a property where such units are at risk of being demolished.

(a) when considering redevelopment applications involving the demolition of rented residential units, to seek the replacement of the demolished rental units with rental units of a similar number, type, size, and level of affordability in the new development, and/or alternative arrangements, which in the opinion or Council are consistent with the intent of this policy; and

(b) when considering such applications in the context of an increase in height and/or density, to secure such replacement units and/or alternative arrangements through an appropriate legal agreement under Section 37 of the Planning Act [emphasis added].²¹

OPA No. 2 AT THE BOARD AND AT DIVISIONAL COURT

The Board

The Board held that it had the jurisdiction to declare the by-law illegal and invalid, reasoning that, because administrative tribunals had the authority to decide Charter

²¹. See Toronto (City) Official Plan Amendment No. 128 (Re), [2000] O.M.B.D. No. 1235 (18 February 2000; M.A. Rosenberg) (QL) in which the Board approved the redevelopment of the site but required Goldlist Properties Inc. to increase the component of replacement residential rental units on the site from 117 to 146 units. The Board also imposed a tenant compensation package for eligible tenants and a number of conditions to be secured by way of an agreement under s. 37 of the Planning Act.
of Human Rights and Freedoms issues, it could thereby determine the City’s authority to adopt Official Plan policies. The Board stated,

If the interpretation of constitutionality can be determined by an administrative tribunal, our conclusion is that a fortiori, a finding of the City’s competence to adopt Official Plan policies should be considered just as proper ...\(^\text{22}\)

The Board further held that the Planning Act did not authorize the City to adopt OPA No. 2. The Board stated,

The Board does not dispute that the city may have the power to enact positive policies in the Official Plan that may encourage the development of rental housings or the retention of rental stocks. As long as these policies are matters within the realm to “manage and direct physical change” of the municipality pursuant to section 16(1)(a) of the Planning Act, it may be free to adopt.

For example, it is our view that the city may adopt policies by way of giving bonusing provisions to enable rezoning from an office use to residential rental uses. What the City cannot do and has in fact done in this case is to set up a municipal approval scheme based on criteria not permitted in law.\(^\text{23}\)

After finding that OPA No. 2 was not authorized by the Planning Act, the Board turned its attention to the TPA. The Board accepted the developers’ characterization of OPA No. 2 as an attempt to re-introduce the repealed RHPA in the guise of Official Plan policies, because it was “but a reclaim by the city of municipal powers that have otherwise been repealed by the Ontario Legislature.”\(^\text{24}\) The Board determined that the TPA removed the City’s powers to regulate with respect to approvals for demolition and conversion. In the Board’s view,

It is our finding that the city has not only reintroduced restrictions that have been repealed by the Tenant Protection Act, it has created a scheme that may thwart the intent of the new statute.

If these policies under OPA 2 were held to be valid, they would obligate landowners to countenance the following scenario. On one hand there is the protection of existing tenants imposed by the province, and, on the other, the resurrected scheme of the protection of existing rental units imposed by the city under OPA 2. In short, the landlord’s ability to engage in renovations, repairs or conversions as of right provided that they meet the security of tenure would be effectively debilitated or delayed. The intent of the new legislation may be defeated by OPA 2.\(^\text{25}\)

### The Divisional Court

On 5 June 2000, the City’s application for leave to appeal to the Divisional Court was granted on the following three points of law:\(^\text{26}\)

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\(^{22}\) Supra note 11 at para. 12.

\(^{23}\) Ibid. at paras. 35, 36.

\(^{24}\) Ibid. at para. 21.

\(^{25}\) Ibid. at paras. 38, 39.

\(^{26}\) Toronto (City) v. Burton-Lesbury Holdings Ltd. (2000) O.J. No. 2887 (Div. Ct.) per Hartt, J. The
1. Did the Board exceed its jurisdiction in deciding that OPA No. 2 was illegal and invalid?
2. Did the Board err in holding that OPA No. 2 is not authorized by the Planning Act?
3. Did the Board err in holding that OPA No. 2 was at cross-purposes or in conflict with the TPA?

The Divisional Court’s unanimous judgment answered all three questions in the affirmative. The Court was satisfied that sections 2(j) and 16(1) of the Planning Act were sufficiently broad enough to include authority to adopt OPA No. 2. In addition, following a review of statements made by the framers of the TPA, the Court held that the TPA was never intended to remove municipal powers to restrict conversion through Official Plan policies. The Court further relied on a recent decision of the Supreme Court of Canada, Spraytech v. Town of Hudson [Spraytech], for the proposition that municipal enactments can coexist with provincial statutes unless there is a true conflict and that no such conflict existed in the case.

**OPA No. 2 AT THE COURT OF APPEAL**

In its unanimous judgment, the Court of Appeal concluded that the Divisional Court erred with regard to the jurisdiction of the Board to rule on the validity of OPA No. 2. The Court ruled that the Board necessarily had the jurisdiction to consider whether OPA No. 2 was an “official plan” within the meaning of the Planning Act. However,

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City of Hamilton was also granted leave to appeal by J. Hartt. Subsequently, on 13 September, 2000 the Regional Municipality of Ottawa-Carleton and the City of Ottawa were granted leave to intervene in the appeal.

27. *Toronto (City) v. Goldlist Properties Inc.*, (2002) 58 O.R. (3d) 232 (Div. Ct.), *per* Blair, Day and Marchand JJ. On the jurisdictional issue, the Court stated (at paras. 52 and 58),

The Board erred in concluding that it was “necessary and incidental” to its determination of whether the by-law should be approved on Planning Act principles, for it to determine the validity of the by-law. … Its jurisdiction is to approve, modify and approve, or refuse to approve the Official Plan amendment based on the planning principles under the Planning Act. Put another way, neither the Planning Act nor the Ontario Municipal Board Act, nor the Municipal Act … give the OMB a supervisory jurisdiction over the legislative competency of municipalities. The Board is given supervisory jurisdiction in this context, over their municipal planning competence.


29. *Supra* note 27. Day J. stated, “Whatever the difference between the municipality and the province in the case before this panel, they are not in conflict” (at para. 39).


In our respectful view, the Divisional Court erred in holding that the OMB lacked jurisdiction to consider whether the by-law adopting OPA 2 was authorized by the Planning Act. Put shortly, we think that the Board necessarily had the jurisdiction to consider whether OPA 2 was an “official plan” within the meaning of the term in the Planning Act before it could consider the document on its planning merits. The
the Court agreed with the Divisional Court that the City of Toronto had the necessary authority to enact OPA No. 2 under the Planning Act and that OPA No. 2 was not in conflict with the TPA.

**OPA No. 2 and the Planning Act**

The Court of Appeal held that a municipality is entitled to include objectives in its official plans related to ensuring an adequate supply of rental housing. The Court based its ruling on (1) the express language and broader context of the Planning Act; (2) the purpose of Official Plan policies; and (3) the importance of broad readings of municipal powers as established in Spraytech.

First, the specific wording of section 16(1)(a) of the Planning Act provided that an official plan shall deal primarily with physical change. The developers argued that the conversion of a rental property was not a physical change within the meaning of section 16(1)(a) but was only a change in tenure. The City of Toronto could not, therefore, address the social issue of a shortage of rental housing in the absence of some actual physical change.

The Court refuted this argument, pointing out that section 16(1)(a) did not say that it shall deal only with physical change and that this established the minimum requirements, not the outside limits, for the contents of an official plan. In addition, section 16(1)(a) expressly provided that management of the “social, economic, and natural environment of the municipality” were elements of an official plan. Such express language, the Court reasoned, could not support an argument that official plans were limited to the physical aspects of land use planning.

OMB ... had no jurisdiction to approve a document that was not an official plan. We stress that the Board does not have the free-standing jurisdiction, as a court does, to determine that a by-law is invalid. Its power is confined to making decisions necessarily incidental to carrying out its responsibilities under s. 17 of the Planning Act.

31. Ibid. The Court noted (at 456, para. 44) that apart from s. 16(1), the Planning Act contained no other specifics on the content of an official plan or any provisions defining what may or must be included in an official plan.

32. Supra note 28.

33. Supra note 14 at 456, para. 45. Section 16(1)(a) provides that an official plan “shall contain goals, objectives, and policies established primarily to manage and direct physical change and the effects on the social, economic, and natural environment of the municipality or part of it ...”

34. With regard to demolition, conceded to be a physical change, the developers submitted that this was exhaustively dealt with by s. 33 of the Planning Act. The Court rejected this latter argument as without merit. The Court noted (at 460, para. 56),

We see nothing in s. 33 to suggest that it is intended as an exhaustive statement of permissible regulation by the municipality. To the extent OPA 2 deals with demolition of buildings, it does so from a perspective quite different and distinct from s. 33.

35. Supra note 14 at 457, para. 49.
The Court determined that the legislative purpose, as set out in section 1.1, 2, and 3 of the *Planning Act*, made it clear that the *Act* was concerned with broad polices to govern land use planning and the integration and implementation of provincial interests at the local level through the municipal councils exercising their local authority.36

In particular, the Court stressed that the applicable provincial policy statement, issued under the authority of section 3 of the *Planning Act*, made specific reference to the need for a full range of housing, including that designed to be affordable to moderate- and lower-income households.37

Second, the purpose of an official plan was to outline broad principles and to provide a framework of "goals, objectives and policies" to guide planning decisions. An official plan, the Court observed, was not a detailed regulation or a statute and ought not therefore be construed as such.38 Finally, the Court made reference to *Spraytech*,39 in which the Supreme Court emphasized that courts should only in the clearest of cases find a municipal by-law to be *ultra vires*, and quoted with approval the statement of McLachlin J. in *Shell Canada Products Ltd. v. Vancouver (City)*:40

Recent commentary suggests an emerging consensus that 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. Barring clear demonstration that a municipal decision was beyond its powers, courts should not so hold. In cases where powers are not expressly conferred but may be implied, courts must be prepared to adopt the "benevolent construction" which this Court referred to in *Greenbaum*, and confer the powers by reasonable implication. Whatever rules of construction are applied, they must not be used to usurp the legitimate role of municipal bodies as community representatives [emphasis added].41

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37. Provincial Policy Statement (1997), s. 1.2.1(c) provided:
   1.2.1 Provision will be made in all planning jurisdictions for a full range of housing types and densities to meet projected demographic and market requirements of current and future residents of the housing market area by:
   c. encouraging housing forms and densities designed to be affordable to moderate and lower income households.

   In contrast, the Board determined that it was the *TPA* that spelled out the "provincial interest" within the meaning of s. 2(j) of the *Planning Act*. See *supra* note 11, para. 30.
38. *Supra* note 14 at 457, para. 49.
40. [1994] 1 S.C.R. 231, at 244.
The Court of Appeal analyzed the issue of conflict with the TPA from three perspectives: (1) the statutory interpretation of the TPA, (2) the legislative history of the TPA, and (3) the test for conflict as articulated in Spraytech. First, the Court rejected the argument that OPA No. 2 was a reclaim of powers that had been repealed by the province. While the introduction of the TPA removed the RHPA restrictions on conversion of rental buildings, this was not tantamount to conferring rights under the TPA. The Court stated,

The purpose of the TPA is, as its title suggests, the protection of the rights of tenants, not the enhancement of the rights of property owners or developers. The TPA confers no positive rights on property owners or developers with respect to the conversion or demolition of rental buildings. The TPA is silent on the subject of whether a municipality may, through its planning process, introduce its own regulations or controls in this area. Accordingly, as a simple matter of statutory construction, we see nothing in the TPA that precludes the city from including in its official plan policies aimed at restricting the conversion or demolition of rental buildings.

The Court's statement of the TPA's purpose is in stark contrast to the Board's determination that the RHPA's repeal signalled a significant change in provincial policy from the protection of rental units and municipal controls under the RHPA to the protection of the rights of tenants under the TPA. In the Board's view,

The evolution of the legislation since the enactment of the Rental Housing Protection Act indicates that the province has been occupying the legislative field involving residential tenants and tenancy. It is our finding that the recent enactment of the

42. Ibid.
43. Goldlist, supra note 14 at 461, para. 62.
44. This argument was central to the developer's position. However, the key issue is whether the TPA provided any rights to developers to convert or demolish property. The TPA is silent on this point as was its predecessor, the Landlord and Tenant Act, R.S.O. 1990, c. L.7. [LTA]. Under the LTA a landlord could provide notice to terminate for conversion or demolition, but such conversion or demolition could occur only where the required approvals are first obtained, whether under the RHPA, municipal policies, or both. Under the RHPA, unless exempt, a conversion or demolition required municipal approval, whether or not municipalities had their own local policies. With the repeal of the RHPA, municipal approval may still be required, but only where the municipality has chosen to implement policies on conversions and demolitions. There is no legislative requirement, of course, that a municipality implement any such policies. This may change in the near future. Recently, the new Liberal provincial government released its background policy paper, the Residential Tenancy Reform Consultation Paper (spring 2004) dealing with, inter alia, demolitions and conversions. The paper proposes three policy options (at 26–29): (1) a mandated municipal approval process, i.e. bring in laws requiring municipalities to have an approval process based on rules set out by the provincial government (similar to the RHPA); (2) an optional municipal approval process, i.e. bring in laws allowing municipalities to decide whether to have an approval process based on rules set out by the provincial government; or (3) an optional municipal approval process as in (2) except based on rules set out by the municipalities.
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Tenant Protection Act by the province is a significant policy change. The protection of tenants would be shifted from the previous emphasis of the protection of residential units to the protection of the rights of existing tenants. Sitting tenants now enjoy a security of tenure different from the provisions of the former regime.\(^4\)\(^5\)

The Board concluded, in effect, that the TPA was a complete code that did not allow the City to adopt OPA No. 2.\(^4\)\(^6\) However, the Board's decision is notable for its lack of any analysis of the historical and legislative background of the RHPA or of the relevant statutory provisions of the TPA. Had the Board embarked on such an inquiry, it would have been directly confronted with the vexing question of how exactly the TPA might repeal municipal powers that were derived from other legislation, namely the Planning Act, and had been exercised both prior to and during the existence of the RHPA.\(^4\)\(^7\)

First introduced in 1986, the RHPA\(^4\)\(^8\) was designed to prevent the depletion of affordable housing by conversion to condominium units, renovation of affordable units, or outright demolition of residential rental complexes. The RHPA required developers and landowners to obtain the approval of the municipality in which the complex was located.\(^4\)\(^9\) In order to obtain municipal approval of the demolition, conversion, renovation, or repair, an applicant had to meet at least one of the stated criteria.\(^5\)\(^0\)

It is clear, from the legislative debates in 1986, that the RHPA was originally a temporary measure intended to supplement and strengthen existing municipal controls to preserve the rental housing stock.\(^5\)\(^1\) It is very significant, therefore, that the

\(^{45}\) Supra note 11 at para. 16.
\(^{46}\) Ibid. at paras. 18–20.
\(^{47}\) Supra note 14. The Court of Appeal observed (at 445 para. 6):

The municipal approval required by the RHPA was in addition to any approvals that might be required under the Planning Act. Both before and after the enactment of the RHPA, several municipalities, including Toronto, North York, and Scarborough, had official plan policies dealing with the conversion of rental properties to condominiums.

\(^{49}\) R.R.O. 1990, Reg. 1000, s. 1, Sched.1. All municipalities were exempt from the RHPA, except 30 cities, six towns, and one borough in Ontario, each having a population of more than 25,000, which was subsequently increased to 50,000 in 1989. There were no exemptions by municipality for conversion to condominiums or co-operatives.
\(^{50}\) R.R.O. 1990, Reg. 1000, s. 7. Council could not approve an application under the RHPA unless at least one of the following criteria was met:

1. if demolition approval was sought, that the property was structurally unsound;
2. if approval of renovation or repairs is sought, that the property is and will remain structurally unsound unless the repairs and renovations are effected and repairs and renovations cannot be effected without vacant possession;
3. the applicant agreed to provide the same number of new units with similar rents in the same area and to provide accommodation in the same area of similar quality and rent to tenants required to vacate as a result of the approval; or
4. the proposal did not adversely affect the supply of affordable rental housing in the municipality.
RHPA was not intended to replace or supplant any existing municipal controls. At the time of introducing the RHPA, then Minister of Housing, Alvin Curling, stated,

There is an urgent need to preserve the existing supply of rental housing in many areas of our province ... I also indicated that this government would be taking a strong stand against efforts to remove sound, affordable housing through conversion, demolition and other measures.... This legislation will be in effect for 24 months ... This legislation will result in stricter and more extended controls for a two-year period, which will ensure the protection of Ontario's valuable housing stock [emphasis added].

Later, upon second reading of the RHPA, Minister Curling remarked,

_The Rental Housing Protection Act_ will provide breathing space while the pressures for demolition, conversion and luxury upgrading are reduced through our rent review and housing supply initiatives. The legislation is, in large part, a response to municipal requests for broader controls.

Furthermore, a review of the provisions in the TPA on demolition, conversion, and renovation reveals that they are essentially the same as those previously contained in the LTA. The main differences are twofold: (1) the TPA contains provision for compensation for evicted tenants, and (2) conversion must be to "other than residential premises" rather than to "other than rental residential premises." In addition, section 71 requires that no order terminating a tenancy is to be issued unless the Tribunal is first satisfied that the landlord intends in good faith to demolish, convert, or renovate "and has obtained all the necessary permits or other authority that may be required to do so."

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51. The RHPA, 1986 was to be repealed on 30 June 1988 but on 24 May 1988 it was extended for another year to 30 June 1989. In 1989, the RHPA, 1989 was introduced announcing permanent measures to control Ontario's rental housing stock.

52. See *Nenkov v. Waterloo (City)*, (1990), 24 O.M.B.R. 492, for an example of the Board's considering both municipal policy and the RHPA in an application for conversion to condominium. In 1977, the City of Waterloo had adopted its policy of discouraging conversions. The Board held that the proposed conversion would have an adverse impact on the available stock of affordable rental accommodation. It satisfied neither the necessary criteria for conversion for pursuant to the regulations under the RHPA or the condominium conversion policy of the City of Waterloo.


55. _TPA_, ss. 53–58 and 71.

56. _LTA_, s. 105(1).

57. _LTA_, s. 105(6) was equivalent to s. 71. It is arguable that "or other authority that may be required" implies that, where required, municipal authority must be obtained in advance of any application for termination of tenancies. However, such an argument was not advanced in *Goldlist* before the Court of Appeal.
In short, as was the case under the LTA, the TPA provides a process for termination of tenancies but is silent on the circumstances in which a developer may be authorized to demolish or convert a building prior to serving any notices of termination. In effect, the provisions in OPA No. 2 override the TPA in that approval from Toronto City Council must first be obtained before the procedures for termination of tenancies set out in the TPA are invoked.\(^{58}\)

Second, the Court of Appeal rejected the two arguments of the developers on the scope and purpose of the TPA: first, that the focus of the TPA was on tenants and tenure rather than on rental units,\(^{59}\) and second, that the enactment of the TPA removed the discretionary power of municipalities to control the conversion and demolition of rental housing in Ontario.

The Court relied on statements of the provincial government to conclude that the repeal of the RHPA demonstrated no intention to limit the ability of municipalities to adopt policies protecting their rental housing stock. The Court dismissed the argument that the enactment of the TPA removed the discretionary power of municipalities to control the conversion and demolition of rental housing in Ontario.

While we are changing the Rental Housing Protection Act, we have made no changes whatsoever to the authority of municipalities to adopt official plan policies restricting condominium conversions. Municipalities can still discourage condominium conversions through their official plan policies that exist in the present city of Toronto if they feel a conversion is not in the best interests of their community.\(^{61}\)

Three years later, Brian Coburn, parliamentary assistant to the Minister of Municipal Affairs and Housing, reiterated the TPA's policy intent:

Bill 96 [the TPA] allows municipalities to use their official plan policies to manage conversions and demolitions in the best interests of their constituents. Through that

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58. Section 9(1) of the RHPA expressly provided that approval of municipal council was required before a notice of termination was given under s. 105 of the LTA.

59. This is true in the rent control context in that the TPA expressly shifted controls from the unit to the tenant. With the introduction of vacancy de-control, rent control became a tenant-specific – as opposed to a unit-specific – form of protection. Vacant units were exempt from any controls, and the landlord could charge what the market could bear. Once the unit was re-occupied, rent controls resumed. It does not necessarily follow, however, that the lifting of rent controls on vacant units means that the TPA also intended to remove all municipal powers to protect the quantity of available rental units. In fact, the TPA's introduction of extended benefits to individual tenants in the event of demolition or conversion underscores the TPA's intention to protect tenants.

60. Supra note 14 at 462, para. 66.

61. Ontario, Legislative Assembly, Official Report of Debates (Hansard), (12 May 1997) at 9999 (Hon. Al Leach); supra note 14 at 462, para. 64.
planning exercise, they have the ability to forecast and protect their communities and design for future growth.62

Third, the Court held that the Board applied the wrong test for determining whether there is conflict between OPA No. 2 and the TPA. Relying on Spraytech,63 the Court affirmed that the test is an "impossibility of dual compliance" when determining whether there is a conflict between a municipal by-law and provincial legislation. The Court stated,

A conflict rendering a by-law invalid arises only where one enactment compels what the other forbids. On this test, it is clear that restrictions on conversion or demolition imposed on the owners of rental properties as a result of OPA 2 do not conflict with the legal protections afforded tenants under the TPA.64

GOLDLIST'S IMPACT
The Goldlist decision has clarified, to some extent, the Board's jurisdiction to determine the legality of official plan policies. In particular, the decision confirms the legality and validity of OPA No. 2 as an "official plan" within the authority of the Planning Act. More important, the decision confirms the authority of municipalities to pass by-laws on rental housing, in this case addressing the encouragement, preservation and replacement of rental housing. It is important to note, however, that as the Board effectively disposed of the appeals on OPA No. 2 without evidence as to the planning merits of OPA No. 2, the planning merits of OPA No. 2 have yet to be determined by the Board.65

Goldlist has also clarified the principle that a provincial government's enactment in a specific subject area does not preclude municipalities from enacting by-laws in that same subject area as long as the laws do not conflict. The test for conflict is high: there must be an "impossibility of dual compliance". As stated above, while the TPA may provide the procedure for termination of tenancies and rights to compensation where notice of termination has been given,66 the TPA says nothing about whether or not a right to terminate exists in the first place. In the language of Spraytech,67 the TPA does not "compel" what OPA No. 2 "forbids".68 Finally, of significant importance to tenants, the

63. Supra note 28. Spraytech had not yet been released by the Supreme Court of Canada at the time of the Board's decision on 21 September 1999.
64. Goldlist, supra note 14 at 462, 463, para. 67.
65. It may be that the planning merits of OPA No. 2 will become part of the appeal of the new Plan before the Board. The pre-hearing was scheduled to commence in April 2004.
66. TPA, ss. 54, 55.
67. Supra note 28.
68. Nevertheless, landlord advocates continue to maintain that the discretionary power of municipalities to control the conversion or demolition of rental residential housing has been removed.
Court has reaffirmed that the central purpose of the TPA is the protection of the rights of tenants and not the enhancement of the rights of property owners or developers.  

**Is It Good Planning? The Board’s Consideration of the City of Toronto’s Rental Housing Policies**

While it is now established that municipalities may regulate in the area of rental housing through their official plan policies, the evaluation of these policies remains within the jurisdiction of the Board. In *Interval Development Corporation Limited v. City of Toronto [Interval Development]*, the Board heard an appeal from a refusal by the City to approve a plan of condominium and enact an OPA to permit the conversion to condominium of a mixed-use commercial residential site, known as “The Maples”. The application, proposing a conversion of 500 purpose-built rental units to condominium, was opposed by the City on the basis that it was contrary to matters of provincial interest, was premature, and was not in the public interest.

The City further argued that the proposal did not conform to both existing condominium conversion policies of the City and the emerging policy context, including

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69. In *Metropolitan Toronto Housing Authority v. Godwin* (2002), 161 O.A.C. 57 (C.A.), the Court of Appeal (at para. 19) held that the TPA was remedial legislation with a tenant-protection focus.

70. As was the case under the RHPA, which also provided for an appeal to the Board: RHPA, R.S.O.1990, c. 24, s. 13.

71. *Supra* note 15. *Interval Development* was released by the Board after the hearing at the Court of Appeal in *Goldlist* but before the Court released its decision. The City of Toronto has filed a notice of motion for leave to appeal *Interval Development* to the Divisional Court.

72. The Board is required by the Condominium Act to have regard to the criteria set out in the Planning Act applying to plans of condominium. As such the Board is required to consider the effect of a development on matters of provincial interest (ss. 51(24)(a)); whether the proposal is premature or in the public interest (ss. 51(24)(b)); and whether the plan conforms to the Official Plan (ss. 51(24)(c)).

73. The application was considered in the context of the former City of Toronto Official Plan [in-force Plan] and Metroplan. Policy 6.18 of the in-force Plan stated that “conversion to condominium of duplexes, triplexes, and all other buildings originally constructed to provide one or more rental apartments is premature and against the public interest, until the vacancy rate for private apartments across Metropolitan Toronto regularly returns to at least 2.5 per cent.” The stated objective of Metroplan’s housing policies was “to ensure the availability across Metropolitan Toronto of an adequate supply and mix of housing to meet the full range of housing needs, and to attract and accommodate population growth.” Policy 123 provided that “Area Municipal official plans and zoning by-laws shall provide for a full range of housing types comprising a mix
OPA No. 2 and the new City of Toronto Official Plan [new Plan].

The City's staff report concluded,

This application would result in a reduction in badly needed conventional rental housing, reducing the availability of rental housing at a time when little new conventional rental housing is being produced. Existing older rental housing tends to be more affordable than new rental housing. The application would serve to reduce the availability of mid-range affordable rental housing, further reducing the rental opportunities and choices available to tenants current and future. The application is inconsistent with the policy framework provided by legislation and the Official Plans, is premature and not in the public interest.

**Regarding Matters of Provincial Interest**

The City argued that, given the lack of production of purpose-built rental housing, the proposed conversion did not meet the principle of maintaining a full range of housing to meet the current and future needs of the City's residents. The Board held, however, that the proposal had regard to both matters of provincial interest under sections 2(j) of the *Planning Act* and the housing policy objectives set out in the provincial policy statement. It ruled that the application maintained a full range of housing on the basis that the proposed change in tenure (from rental housing to ownership housing) would not reduce the overall supply of housing in the downtown Toronto area. The Board found

... that Interval's application maintains a full range of housing as a change in tenure will not reduce the overall supply of housing in the downtown area.

Unlike the situation that can occur with demolition applications, no units will be lost through the conversion and security of tenure is provided for existing tenants under the provisions of the *Tenant Protection Act*.... the Board finds that the proposal is consistent with the objectives of s. 2 of the Act and housing policies contained in the PPS....

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74. The City's new Plan was adopted by City Council in November 2002. It is currently under appeal to the Board. The new Plan contains a number of policies on housing and underscores the need to preserve the supply of rental housing. In *Interval Development Corp. v. Toronto (City)*, [2003] O.M.B.D. No. 505 (27 May 2003; J. de P. Seaborn), the Board held (at para. 8) that the hearing should focus on whether the conversion constituted good planning in light of policies contained in the in-force Plan and Metroplan. Any evidence concerning any plan not in force at the time of application (i.e. OPA No. 2 and the new Plan) was "admissible, relevant but not determinative".


76. *Supra* note 15 at 44.
**Prematurity and the Public Interest**

In addition, the Board was of the view that the proposal was neither premature nor contrary to the public interest. The Board considered the impact of the conversion in the context of vacancy rates, the Maples’ tenant population, rent levels and affordable ownership, and the protection of existing rental housing.

**Vacancy Rates.** The vacancy rate emerged as the central issue at the hearing. The City argued that, while the vacancy rate may have increased to 2.5% in 2002, the proposal was premature until the CMHC reported vacancy rate regularly returned to at least 2.5%. The Board noted,

... (the City) testified that the conversion policies set out in the in-force Plan are to be strictly applied and the ... relaxation of the conversion policy found in OPA 2 and the new Plan is directed to toward high end rental. The rents at the Maples are not high end ... and the conversion of this building would remove badly needed rental opportunities ...

The Board found that both the current and predicted vacancy rates, as reported by the Canadian Mortgage and Housing Corporation (CMHC), should be considered in interpreting in-force Plan Policy 6.18:

The Board finds that the vacancy rates based on the annual survey results and predicted rates ... should be relied upon in determining whether the conversion can be entertained under Policy 6.18.... In considering the requirements of Policy 6.18 there is no past precedent upon which the Board can rely. However, the Board is persuaded by the opinion of Mr. Dunning in particular that past performance and predictions of future trends need to be considered when judging the health of vacancy rates.

**Tenant Population.** The Board found that the building’s tenant population was young and mobile with a high turnover rate, composed of many university students and professionals but few seniors or families. The City argued that the complex served a sector that preferred to rent and that, because of the high turnover, the loss of the units would largely affect the needs of future tenants as opposed to current tenants. The Board determined that the City’s position was that, in effect, conventional rental housing should never be converted:

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77. *Ibid.* at 43.
78. Policy 6.18 of the in-force Plan.
79. *Supra* note 15 at 45.
80. CMHC surveys capture the vacancy rate for conventional rental units. It does not include the secondary rental market. The CMHC survey results of October 2002 indicated a 2.5% rate for 2002 and 3% for 2003. The CMHC report of spring 2003 predicted vacancy rates for Toronto at 3.5% for 2003 and 5% for 2004 (*CMHC Housing Market Report, spring 2003*).
81. *Supra* note 15 at 48. The Board reasoned that future vacancy rate trends would also have to be taken into account where the vacancy rate had been healthy for a sustained period of time, yet the prediction was for the rate to decline. In such a context, an approval for conversion may be inappropriate.
If the Board concluded that because the turnover rate is so high and therefore many people are provided with housing on an annual basis that the application should be rejected, then the state of the vacancy rate would become irrelevant. In effect, the City's position would lead to the conclusion that regardless of vacancy, the Maples is conventional purpose built that should never be converted.... While a clear policy objective is the preservation of rental housing stock, this is one of many policies and the provision of a full range of housing opportunities is also a legitimate policy objective.82

Rent Levels and Affordable Ownership. The Board concluded that the conversion would add to the range of available housing through the secondary rental market because investors would purchase the units, making them available for rent.83 As well, the conversion would not affect the supply of affordable housing because the rents were at or above mid-range rents84 and higher-than-average rents as reported by CMHC. The impact of conversion would not, in the Board's view, affect the conventional rental market, which typically provides units at rents that may be characterized as affordable or average rents.85

Moreover, given that the Board found that the rents paid by tenants were comparable to rents paid for condominium units,86 the conversion presented an opportunity for many tenants to purchase a unit at a cost equivalent to existing rents. This was found to constitute a desirable result:

... the Board cannot ignore the reality that for a number of other tenants the prospect of purchasing a unit and paying monthly costs that are equivalent to existing rents is a positive attribute of the project and a factor for the Board in considering the desirability of the conversion.87

Protection of Existing Rental Housing. The City argued that the retention of rental housing stock was a clear policy objective and that the rental of condominiums was an insufficient substitute. The Board responded:

While the Board accepts that preserving conventional rental is a clear policy objective, the difficulty with the position taken by the City is that the argument suggests that the Maples could never be converted, regardless of the vacancy rate.... The suggestion that the Maples be protected from conversion at all costs is not consistent with the in-force Plan that requires in Policy 6.17 an evaluation of desirability. While the Board accepts that the City's intent is to strictly apply the conversion policy, it is

82. Ibid. 49–50.
83. Ibid. 52. The Board noted that "not all of the units will be owner occupied and will therefore be available to tenants as part of the secondary rental market."
84. In the new Plan, mid-range rents are defined as rents that exceed affordable rents, but fall below 1.5 times the City’s average rent.
85. Supra note 15 at 51.
86. Ibid. at 51. The Maples’ property manager testified that the minimum rents were $1550 for a two-bedroom, $1075 for a one-bedroom, and $885 for a bachelor.
87. Ibid. at 52.
not enough for the City to conclude that the application is undesirable on the sole basis of a change in tenure.\textsuperscript{88}

The Board thus acknowledged that the preservation of rental housing stock was a clear and valid policy objective. However, in the Board’s view, the conversion would provide affordable condominium housing in that the cost of condominiums at the Maples would be below the high-end, luxury buildings in the downtown area. In this way, the conversion would contribute to a range of housing that already included luxury condominiums and home ownership.\textsuperscript{89}

\textbf{Conformity with the Official Plan}

The City argued that proposed conversion was not consistent with the in-force Plan because the vacancy rate had not regularly returned to 2.5% within the meaning of Policy 6.18. In addition, the conversion met neither of the conditions under the new Plan that permit conversion.\textsuperscript{90}

Both OPA No. 2 and the new Plan provide for a consideration of conversion where high-end rents are being charged, regardless of the vacancy rate.\textsuperscript{91} The effect is to not permit applications for conversion, unless the building is a high-end rent exception, and if it is not, only where the vacancy rate has been at or above 2.5% for at least two years. However, the Board determined that it was not necessary to make any findings on the applicability of the rent exception under OPA No. 2 and the new Plan:

\begin{quote}
The Interval application has been advanced under the in-force Plan. What is significant are the types of rents that are charged at the Maples and the impact of conversion, both of which are factors to consider in evaluating the desirability of the conversion in the context of the City’s policies and in particular under Policy 6.17 of the in-force Plan.\textsuperscript{92}
\end{quote}

\textsuperscript{88} Ibid. at 53.

\textsuperscript{89} Ibid. at 52. The Board noted that home ownership in the downtown core was in very short supply and, where available, very expensive. It is noteworthy that there is no reference in the Board’s decision on the current wealth of opportunities for condominium ownership in downtown Toronto. In fact, recent evidence suggests that the Toronto condo market is already saturated, even as new units are constructed. In a recent article, the vice-president of Beaux Properties International, Jason Birnboim, stated that, as a result of a glut of condos coming online, condo investment in Toronto would be a “disastrous mistake”: Matthew McKinnon, “Caught in a Perfect Storm” \textit{National Post Business} (March 2004) 53.

\textsuperscript{90} Policy 3.2.1.8 of the new Plan restricts conversion to condominium as being premature and not in the public interest unless (a) the rental apartment vacancy rate for the City of Toronto, as reported by CMHC, has been at or above 2.5% for the preceding two-year reporting period; or (b) all of the rental housing units have rents that exceed mid-range rents at the time of the application.

\textsuperscript{91} OPA No. 2 included the added restriction that 66% of tenanted households in high-end rental buildings were required to express support for the conversion. At the time Council adopted OPA No. 2 it was resolved that high-end rental units be defined as 1.5 times the city average rent, by unit type, as reported by CMHC: supra note 75 at 7–8.

\textsuperscript{92} Supra note 15 at 51.
The Board did not consider the application to be undesirable solely because of a change in tenure, and neither Policy 6.17 nor 6.18 of the in-force Plan nor MetroPlan made any specific reference to the preservation of tenure as a housing goal. The development therefore complied with the policy of requiring a range of housing types. Condominiums at the Maples would contribute to the range of housing type currently offered in the downtown core by offering an alternative to luxury buildings, although not affordable to low- and moderate-income residents.93

CONCLUSION

While Goldlist confirms that municipalities are empowered to enact rental housing protection policies, Interval Development equally confirms that, despite such policies, there are no assurances that the rental housing stock will nevertheless be protected. The Board, in Interval Development, articulated a different perspective on what it means to provide a full range of housing to Toronto tenants. Through its consideration of in-force and emerging Official Plan policies, the Board has provided some indication of how OPA No. 2 and the new Plan may be interpreted and applied in future conversion applications.94 This is of great significance to Ontario’s tenants because it indicates to municipalities what direction they may need to go in preparing and defending their rental housing protection policies.

Several important policy positions were articulated by Interval Development. First, the Board was persuaded that the primary impact of conversion was merely a change in tenure and that the overall supply of housing type would remain constant.95 However, while the overall supply of housing might not be affected, the overall supply of the rental housing would be affected by the development. Invariably, rental units would be lost through the conversion,96 despite the fact that the TPA provides security of tenure to existing tenants.97 In essence, the Board viewed the development’s provision

93. The in-force Plan, at s. 6.1(c), provides for the following housing goal:
   (c) to encourage a range of housing types within the City appropriate to the needs of the households of varying size, composition and income, including private low-end-of-market housing and affordable housing for low and moderate residents.

94. On the assumption that OPA No. 2 and the new Plan emerge from their Board hearings relatively intact.

95. While the housing type remained apartment-style, even after conversion, and there was no net loss of overall accommodation, the Board remained unmoved at the prospect of the loss of substantial residential rental stock.

96. Supra note 75 at 10. The Toronto Staff Report noted that despite the large volume of condominium production there was, between 1996 and 2002, a loss of 3,388 condominium rental units, an average of 678 units per year. The Board acknowledged the loss of rental units, noting that not all units would be owner occupied and would therefore be available to tenants as part of the secondary market, which, although it could not be relied upon to replace conventional rental housing, its availability could not be ignored; supra note 13 at 52.

97. Section 54 of the TPA provides for security of tenure for a tenant who occupied the unit at the
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of affordable ownership opportunities in the downtown core, rather than the maintenance of rental opportunities, as fulfilling the public interest.

Second, the determination of the vacancy rate will remain a dominant issue in future conversion applications in view of the vacancy “triggers” contained in the in-force and emerging Official Plan policies. The Board scrutinized the wording of the in-force Plan, noting that it was not as specific as OPA No. 2 or the new Plan that required historical data for a “two-year reporting period”.98 The Board’s analysis of the vacancy rate, however, did not assess where in the rental market the majority of vacancies were occurring. Both OPA No. 2 and the new Plan make it clear that the focus of the vacancy rate is not on the high-end but on mid-range and affordable housing.99

Third, the Board’s characterization of the City’s position—that conventional rental must be maintained in every circumstance—is overstated. Such a characterization is nonsensical in light of the policies' objective to regulate but not prohibit conversions. Ultimately, the City’s central position, rejected by the Board, was that the application was premature because it was unclear whether the vacancy rate would remain at or above 2.5%.100 Moreover, even assuming that the vacancy rate had returned to a healthy level, the City’s view was that there was a sufficient amount of ownership housing, and that where conventional rental housing was not being built, it was necessary to preserve the existing affordable rental stock.

Fourth, the Board’s distinction between housing types and housing tenure may become less tenable in view of the express language of the new Plan that includes tenure as part of the goal of maintaining a full range of housing.101 This may fairly be interpreted

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98. Supra note 14 at 48.
99. In addition, the Board did not provide an extensive analysis of what constituted affordability. It was satisfied that the rents exceeded mid-range rents, which were defined in the new Plan as rents that exceed affordable rents but fall below 1.5 times the average rent by unit type as reported by CMHC.
100. The City of Toronto’s overall vacancy rate in 2003 was 3.8% – the first time since 1971 that the vacancy rate exceeded 2.5% (CMHC, Rental Market Report FASTFAX: Toronto CMA, November 2003).
101. Policy 3.2.1.1 of the new Plan states, A full range of housing, in terms of form, tenure and affordability, across the City and within neighbourhoods, will be provided and monitored to meet current and future needs of residents. A full range of housing includes: ownership and rental housing, affordable and mid-range rental and ownership housing ... In Interval Development, the Board adopted the evidence of the landlord’s expert planning witness and concluded that the City’s policies consistently encouraged a range of housing types, in various forms of tenure, whether ownership or rental, but that there was no plan that sought to identify a housing mix by form or tenure: supra note 15 at 50.
as a statement supporting the retention of rental housing over ownership housing, even where there be would be no net loss in the number of overall units.

Finally, it remains to be seen whether the Board would reach a similar result as in *Interval Development*, where the proposed conversion affects more affordable rental housing. The Board clearly distinguished the Maples from affordable housing in the conventional rental market by classifying its rent levels as higher than average and comparable to the condominium market. The Board’s approach to whether the proposed conversion might affect the affordable rental housing supply echoes the approach of the Board in earlier appeals heard under the *RHPA*. In those appeals, the Board’s determination of whether the granting of approval would “adversely affect the supply” of affordable rental housing also tended to focus on vacancy rates.\(^{102}\)

At least one market analyst has predicted that trends in vacancies in the Toronto CMA\(^{103}\) will continue to increase to at least 5% in 2004 and 6% in 2005.\(^{104}\) While current vacancy trends are not necessarily permanent, the combined impact of low mortgage rates, slow job creation, and increasing supply has led to soft demand for rental housing.\(^{105}\) If these trends continue, it is probable that landlords will continue to seek conversion to condominium, and such approvals may be obtained where they have been refused in the past.

In the long term, however, if more rental units are lost through conversion, the overall supply of conventional rental units will decrease. As noted, condominium conversion does not completely replace all converted rental units because many units become owner-occupied.\(^{106}\) Additionally, condominium rentals make up a very small percent-

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102. In *United Tenants of Ontario v. Hobbs*, (15 January 1993), File No. M910052 (OMB) [unreported] the proposed conversion was found not to adversely affect the supply of affordable housing in North Bay in part due to the growing vacancy rate, which at the time was 3 per cent. In *400 Walmer Road, Toronto* (11 May 1987) File #M870009 (OMB) [unreported] the Board stated (at 23),

... the loss of affordable rental housing by conversion would be considered an adverse affect [sic] where any significant number is involved and where the vacancy rate indicates that there is little or no choice of affordable rental units in the municipality.

103. The Toronto CMA (Census Metropolitan Area) includes all of the City of Toronto, Peel Region, York Region, and parts of Halton and Durham Regions.


105. *Ibid.* at 46–49. In addition, some 80% of Canadian immigrants rent their first home, and there has been a decrease in the number of landed immigrants coming to Canada since the restriction of entry requirements in the post-September 2001 era. In 2001, 250,484 landed immigrants arrived in Canada. In 2003, the number dropped to 221,417: *supra* note 89, *Caught in a Perfect Storm*, 52.

106. In *Interval Development* the building had a high turnover rate reflective of a large proportion of
age of the overall rental housing market.\textsuperscript{107} Moreover, demand for rental units from low- and moderate-income households remains strong. In the event of rising mortgage rates, increased job creation, and the return of pre-2001 immigration levels, the City may be confronted with a significant shortfall of affordable rental housing as the vacancy rate declines. In fact, it has been persuasively argued that just such a combination of factors in the mid-1980s triggered municipalities' requests for greater controls and the policy basis for the \textit{RHPA, 1986}.\textsuperscript{108}

\textsuperscript{107} The majority of tenants living in the secondary housing market rent houses, duplexes, second suites, and apartments over stores. Only about 5\% are rental condominium units. In addition, rented condo units have decreased sharply, by a total of 6,226 units between 1996 and 2002, a total decrease in rented condos of almost 20\% over the last six years. See \textit{supra} note 4, \textit{Report Card 2003}, at 7 and App. A at 21.