

## Report to City of Kenora, Planning and Property Committee

Statutory Public Meeting, July 6, 2010

**Subject: City of Kenora, Final Draft Zoning By-law (June 16, 2010)**

**Report Recommendation:** That the Planning and Property Committee recommends that Council:

1. Adopts the City of Kenora Zoning By-law, including text and associated schedules (maps); and
2. That Zoning By-law Number 160-2004 be repealed.

### **Background**

Effective January 1, 2007, the *Planning and Conservation Land Statute Law Amendment Act, 2006* (Bill 51) requires that official plans be revised at least every five years, while zoning by-laws must be revised within three years after a new official plan is in effect. In the Fall 2009, the City of Kenora initiated the five-year review of its Official Plan as mandated by the Province under Section 26 of the *Planning Act*. The Official Plan was adopted by Council on May 17, 2010 and is currently with the Ministry of Municipal Affairs and Housing for Ministerial approval. It is anticipated that the Official Plan, and implementing Zoning By-law will be ready for implementation in early fall 2010.

Section 34 of the *Planning Act* permits Council to pass a zoning by-law to prescribe how lands may be used, where buildings and other structures may be located, the types of buildings that are permitted and how they may be used, and the size of lots, their dimensions, parking requirements, building heights and setbacks of buildings from property lines and the street.

### **Community and Aboriginal Engagement**

**Community and stakeholder engagement** is a key component of the review process and aims to inform, hear, and engage the community so that their input is incorporated in the development of the Zoning By-law.

The community engagement process included a **Focus Group Session** which was held on September 23, 2009 at the Super 8 Motel in Kenora. Key stakeholders from the community, including representatives from the Lake of Woods District Property Owners, Treaty 3, Moncrief Construction, and other organizations were invited to participate. This was an opportunity to introduce the process for the review of both the Official Plan and Zoning By-law.

The City hosted two public open houses on the Draft Zoning By-law on May 4, 2010; there were approximately 20 interested people in attendance at the afternoon session. The evening session was not as well attended.

Discussion surrounded protection of residential waterfront uses, sizes of parking stalls and the minimum buffer distance between kennels and residential uses. Several individual property owners had questions with respect to either their own property or the property of their neighbours; these individuals were asked to contact the City's Planning Department to discuss the individual concerns.

In addition the Draft and Final Draft Zoning By-laws have been posted on the City's portal, and hard

copies provided at both locations of the Kenora Public Library, City Hall and the Operations Centre. The Planning Department has also contacted the local law offices and real estate offices to notify them of the opportunity to comment on the Draft and Final Draft Zoning By-laws.

To date, there has been only one (1) written comment provided to the City of Kenora, or FoTenn Consultants by the agent for the TDL Group (Tim Hortons) and the Ontario Restaurant, Hotel and Motel Association. The comment was to request changes with respect to drive-through facilities. A copy of the proposed changes forms part of this planning report and is attached.

### **Aboriginal Engagement**

The two drafts of the Zoning By-law (March 31, 2010 and June 16, 2010) were mailed to the Chiefs of Wauzhushk Onigum First Nation (Rat Portage), Ochlichagwe'babigo'ining First Nation (Dalles) , and Obashkaandagaang First Nation (Washagamis Bay), together with appropriate and/or statutory notice of public meetings and opportunities to provide comments. No comments have been received as of June 30, 2010.

### **City of Kenora Planning Advisory Committee**

The City of Kenora Planning Advisory Committee (PAC) has been integral to the process. The Committee provided comments with respect to issues the Committee has been faced with on consent and minor variance applications over the years. The Committee members were provided with copies of the drafts and met on several occasions to discuss issues such as parking stall size and required numbers of stalls. Some of the changes in the new Zoning By-law are the result of a review of the numbers of minor variances approved by PAC, over the past six years. The PAC comments were incorporated into the Final Draft Zoning By-law, June 16, 2010.

### **Public and Agency Comments**

Through the Zoning By-law review process to date, the City has received comments from the public and agencies, including Trans Canada Pipeline, Northwestern Health Unit and TDL Group Corp. and ORHMA. Their concerns and issues have been addressed through revisions. The Agent for the TDL Group Corp. and ORHMA, Murray Chown of Novatech Engineering Consultants Ltd., is concerned that his clients interests in maintaining the ability to provide drive through services in association with existing and future store locations are addressed in the new Zoning By-law. While the draft Zoning By-law has revisions to the required number of queuing spaces associated with drive through facilities to permit a minimum of 11 spaces, without requiring specific numbers either before or after an order board or service window, a reduction in the required parking for restaurants, with drive-through facilities, is not addressed.

### **Supporting Documentation**

As part of the Official Plan and Zoning By-law review process, a Final Background Report (April 2010) has been prepared to provide direction to the Zoning By-law (and Official Plan) review by identifying policies and provisions that may currently be missing or require updating based on the Provincial Policy Statement 2005, the Official Plan and other legislation. The Final Background Report also includes a detailed analysis of the existing Official Plan and Zoning By-law in relation to Bill 51 and the Provincial Policy Statement. The Report is also available on the City's portal, or through the Planning Department.

### **Circulation and Notification**

Notification of the Final Draft Zoning By-law, June 16, 2010, was advertised through the following communication tools:

- City of Kenora Community Portal [www.kenora.ca](http://www.kenora.ca), under "What's New";
- Kenora Daily Miner and News on June 12 and 15, 2010;

- The Notification for the Statutory Public Meeting with links to the Community Portal were sent by the City's Planning Administrator via email on April 8, 2010 to the following:
- interested members of the public
- TDL Group
- ORMHA
- Jeff Port, on behalf of John Gale
- City Clerk
- City Council
- Kenora Planning Advisory Committee
- Kenora Urban Trails Committee
- Keewatin Patricia District School Board
- Catholic Education Centre
- Lake of the Woods Control Board
- Secretary of Union Gas
- TransCanada Pipelines
- SUPERIOR PROPANE INC
- Energy Tech Services
- CP Rail
- Ontario Power Generation
- Hydro One Networks Inc.
- Kenora Hydro
- Chief Ken Skead -Wauzhusk Onigum First Nation (a mailed copy was also provided)
- Chief Lorraine Cobiness, c/o John Henry -Ochiichagwe'babigo'ning First Nation (a mailed copy was also provided)
- Chief Alfred Sinclair -Washagamis Bay First Nation (a mailed copy was also provided)
- MMAH – Ministry of Municipal Affairs & Housing
- Kenora Chamber of Commerce
- Kenora BIZ

### **Key Changes**

The Zoning By-law will incorporate a change made to the minimum lot frontage on a navigable waterway in the RR – Rural Residential Zone. The change from a minimum lot frontage of 45 metres to a minimum of 61 metres mirrors the frontage requirements on Black Sturgeon Lake, which were adopted as a recommendation from the Black Sturgeon Lake Management Report (2008), and resulting Official Plan and Zoning By-law amendments.

The width of parking stalls has been reduced from 3 metres to 2.85 metres, as a result of a number of approved minor variance applications for such a reduction. There will now be visitor parking required as part of the development of apartment, multiple attached, and stacked dwellings. The required number of stalls for residential units is reduced from 1.5 to 1. This is a result of the addition of required visitor parking for higher density residential uses.

The development of apartment, multiple attached, and stacked dwellings, and associated lands will include a required amount of amenity space; this will ensure that occupants of higher density residential dwellings will be ensured a residential look and feel to the property.

The use of the City's new Site Plan Control By-law will work hand in hand with the Zoning By-law to ensure orderly, efficient and attractive development within the City of Kenora.

### **Process for Implementation**

The Zoning By-law is anticipated for adoption at the regular meeting of Council, on August 9, 2010.

Following Council adoption, a Notice of Passing will be issued followed by a twenty-day appeal period for the Zoning By-law.

Once the Minister issues its Notice of Decision (with or without Modifications) on the Official Plan, a twenty day appeal period will follow. The Zoning By-law would be in full force and effect the day after the appeal period for the Official Plan lapses.

Attach: Novatech's letter dated June 29, 2010



June 29, 2010

BY EMAIL

City of Kenora,  
60 Fourteenth Street North,  
Second Floor,  
Kenora, Ontario  
P9N 4M9

**Attention: Ms. Tara Rickaby, AMCT  
Planning Administrator**

Dear Ms. Rickaby:

***Re: Draft Comprehensive Zoning By-law  
Ontario Restaurant Hotel and Motel Association  
Our File: 110102***

Novatech Engineering Consultants Ltd. is working on behalf of the Ontario Restaurant Hotel and Motel Association (ORHMA) and its member brands, in this case being the TDL Group Corp. (operators and licensors of Tim Hortons Restaurants), McDonalds Restaurant of Canada Ltd., A & W Restaurants and Wendy's Restaurants of Canada.

This submission, with respect to the draft comprehensive zoning by-law for the City of Kenora, is a follow up to our discussion of June 10, 2010.

Our interest in making submissions on the draft by-law is to ensure that our clients have the ability to continue to operate and maintain their existing store locations, as well as have the ability to develop new store locations. In particular, our interest in making submissions on the draft by-law is to ensure that our clients maintain the ability to provide drive-through services in association with existing and future store locations.

Official Plan Policies:

The City of Kenora adopted a new Official Plan on May 17, 2010. The new Official Plan introduces policies with respect to the location of drive-throughs in the City. The policies of the new Official Plan would limit the location of drive-through facilities to the Commercial Development Area designation in the Official Plan.

TDL Group made submissions with respect to this policy, and discussions are ongoing with respect to possible modification(s) to these policies. It is understood that the City of Kenora may consider requesting that the Minister of Municipal Affairs and Housing make modifications to these policies before issuing a Notice of Approval for the City's new Official Plan.

ENCLOSURE

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#### Drive-Through Facility – Definition:

We note that the definition of a “Drive-through facility” in the draft zoning by-law dated June 21, 2010 now includes the reference that “a drive-through facility may be in combination with other uses, such as... restaurant...”

#### Drive-through Facilities – Permitted Uses:

As discussed on June 10, 2010, it is our position that drive-through facilities should be permitted wherever restaurants are permitted. The draft comprehensive zoning by-law limits the ability to provide drive-through facilities in association with restaurants wherever restaurants are permitted. The draft zoning by-law would limit drive-through facilities to the Highway Commercial zone. The reality is that a drive-through facility is no more intrusive than a parking lot, and in many respects is less intrusive. We are unaware of any planning justification for this approach to limiting the location of drive-through facilities.

#### Drive-through Facilities – Performance Standards:

- We note that the draft by-law does not include a reduced parking requirement for restaurants that provide a “drive-through facility”. Including a reduced parking requirement would be consistent with a recent OMB decision with respect to the comprehensive zoning by-law in the City of Ottawa.
- Further to our discussion on June 10, 2010 we note that the June 16, 2010 draft of the zoning by-law has revised the minimum number of queuing spaces for a restaurant drive-through to a total of 11 spaces. This requirement would be acceptable to our clients.
- We note that the draft by-law requires a minimum 3.0 m separation distance between a drive-through facility and a residential zone. This requirement is acceptable to our clients.
- We note that the draft by-law requires the minimum dimensions of a queuing space to be 3.0m wide by 5.7m in length. These dimensions are acceptable to our clients.

#### Restaurant – Permitted Uses:

Restaurants are permitted in a number of non-residential zones. We note however that restaurants are not listed as a permitted use in the Tourist Commercial Zone or the Light Industrial zone. We have prepared a summary chart of proposed commercial and industrial zones, indicating where restaurants and drive-through facilities would be permitted under the draft zoning by-law (attached). We are unaware of any policy basis or planning rationale for restricting the location of restaurants in tourist commercial or light industrial areas.

#### Existing Store Locations:

We have attached a spread sheet that lists our clients' existing store locations, the proposed zone for each location, and our interpretation of the permission for a restaurant and a “drive-through facility”. With the exception of the McDonalds Restaurant located in association with the Walmart at 24 Milkana Way, it appears that all other stores are located in the Highway Commercial zone, and would be permitted uses, as would be the associated drive-through facilities.

APPENDIX





#### Non-Conforming Uses - Definition:

The language in the definition of "non-conforming" use is of some concern. "Non-conforming" is defined as "a use of land that is not listed as a permitted use in the zone in which it is located but which is tolerated because Section 34(9), Planning Act (R.S.O. 1990) allows it to continue so long as the use is not changed or discontinued from the date when the zoning by-law was passed or amended." The use of the phrase "is tolerated" is inappropriate and misrepresents the intent of Section 34(9) of the Planning Act. The use of the phrase "so long as the use is not changed or discontinued" is also misleading and contravenes the provisions of Section 34(9) of the Planning Act.

#### Non-Conforming Uses – Provisions:

The issue of non-conforming uses, and related provisions in zoning by-laws was the subject of a recent OMB decision, and a recent decision of the Divisional Court of Ontario. The decisions related to an appeal of non-conforming/non-complying provisions of the recently adopted comprehensive zoning by-law, in the City of Ottawa. The decisions determined that the provisions on non-conforming uses in municipal zoning by-laws could not go beyond the provisions of the Planning Act. To express this another way, zoning by-laws can not take away the rights given to property owners by the non-conforming provisions of the Planning Act.

To assist in consideration of these comments, I have attached an article dealing with the evolution of legal non-conforming rights. This article was written jointly by Michael Polowin and Elad Gafni.

Given these recent decisions of the OMB and the Divisional Court of Ontario, Section 3.4 of the draft comprehensive zoning by-law of the City of Kenora should be revised to address a number of concerns including:

- The limitation of six months for cessation of a non-conforming use in 3.4 a) i. offends the law as it now stands,
- The limitation on the permission to rebuild to buildings or structures destroyed by fire or natural disaster in 3.4 d) offends the law as it now stands,
- The limitation on permission to repair or restore buildings or structures to non-complying buildings in 3.4 e) offends the law as it now stands,
- The requirement that replacement buildings comply with all applicable provisions of the draft by-law offends the law as it now stands.

#### General Provisions for Commercial and Industrial Zones:

The requirement that "no employee or visitor parking spaces... shall be permitted in any required front yard adjacent to a Residential Zone" is unnecessarily restrictive. It is noted that the use of the word "adjacent" in this provision means "any Commercial Zone or Industrial Zone fronts on a road opposite a Residential Zone or abuts a Residential Zone..."





**Landscaped Open Space and Landscaped Buffer Strips:**

The requirement of this general provision is that "any opaque features such as a hedgerow or fence that are provided as part of a landscaped buffer strip shall be no taller than 1.5 m, except where a sight triangle is required..." The phrase "no taller than 1.5 m" does not appear appropriate. *↓ lower G. ok.*

The requirement that "any landscaped open space, including a landscaped buffer strip, shall be maintained in a healthy growing condition or shall otherwise be replaced" in an inappropriate provision in a by-law passed pursuant to the zoning provisions, Section 36 of the Planning Act. *True.*

**Design Guidelines for Drive-Through Facilities:**

Concerns raised with respect to drive-through facilities are generally site planning issues. Attempts to address these issues should not be made through restrictions on drive-through facilities in municipal zoning by-laws. It is more appropriate to deal with site plan issues through design guidelines. The industry would welcome the opportunity to work with City staff and their consultants to develop design guidelines for drive-through facilities, as we have in other municipalities across Ontario.

By way of this letter, we reserve the right, and the rights of ORHMA, TDL Group, McDonald's Restaurants of Canada, A & W Restaurants and Wendy's Restaurants of Canada to provide further comments during the review process of the Draft Zoning By-law, should new matters arise from further review of the zoning by-law.

We would welcome the opportunity to discuss our comments with you, at your convenience.

Yours truly,

**NOVATECH ENGINEERING CONSULTANTS LTD.**

Murray Chown, MCIP, RPP  
Senior Project Manager

Nadia De Santi, FoTenn Consultants Inc.  
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Leslie Smejkal, The TDL Group Corp.  
Maurice Luchich, The TDL Group Corp.  
Darren Sim, A & W Restaurants





Susan Towle, Wendy's Restaurants of Canada  
Victor Labreche, Labreche Patterson & Associates Inc.  
Michael Polowin, Gowlings



**KENORA  
BRAND COMPARISON CHART**


Brand	Address	With DY	Without DT	Proposed Zone	Restaurant	Drive-Through Facility	Legal Non-Conforming	Notes
A & W	924 5th St S	X		Highway Commercial (HC)	Yes	Yes	N/A	
Tim Hortons	1344 Highway 17 E	X		Highway Commercial (HC)	Yes	Yes	N/A	
Tim Hortons	714 Lakeview Dr	X		Highway Commercial (HC)	Yes	Yes	N/A	
McDonalds	900 Highway 17 E	X		Highway Commercial (HC)	Yes	Yes	N/A	
McDonalds	24 Milkana Way (Walmart)		X	General Commercial (GC)	Yes	No	N/A	



Date: June 28, 2010  
Job No. 110102

**KENORA ZONING BY-LAW REVIEW**

Zone	Restaurant	Drive Through Facility	Max Total Floor Area	Rear Yard abutting a Residential Zone	Side Yard abutting a Residential Zone	Notes
Local Commercial- LC	Yes	No	300sq.m.	7.5m	6m	
General Commercial- GU	Yes	No		6m	5m	Restaurants shall not include drive through facilities.
Highway Commercial- HC	Yes	Yes		7.5m	6m	
Tourist Commercial- TC	No	No				
Light Industrial- LI	No	No				
Heavy Industrial- HI	Yes	No		18m	16m	
Rural- RU	No	No				
Industrial (I)	No	No				

  
**NOVA TECH**  
 ENGINEERING  
 CONSULTANTS LTD.  
 Job Number: 110102  
 Date: June 21, 2010