

ISSUE DATE:

Jul. 10, 2007

DECISION/ORDER NO:

1924



Ontario

Ontario Municipal Board

Commission des affaires municipales de l'Ontario

PL051203

PL060087

PL060443

2059946 Ontario Limited has appealed to the Ontario Municipal Board under subsection 22(7) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended, from Council's refusal or neglect to enact a proposed amendment to the Official Plan for the former City of Toronto for the purpose of introducing site-specific policies to the current "Low Density Mixed Commercial Residential Area" designation on the northern portion of the site fronting onto Queen Street West, as well as to the current "Mixed Industrial-Residential Area" designation on the southern portion of the site, to permit the development of a 10-storey residential building, with retail at grade, on the northern portion of the site fronting onto Queen Street West as well as a 26-storey residential building on the southern portion of the site on lands located at 1171 and 1171R Queen Street West

Approval Authority File No. 05 133454 STE 18 OZ

O.M.B. Case No. PL051230

O.M.B. File No. O050191

2059946 Ontario Inc. has appealed to the Ontario Municipal Board under subsection 34(11) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended, from Council's refusal or neglect to enact a proposed amendment to Zoning By-law 438-86, as amended, of the former City of Toronto for the purpose of amending the current MCR T3.0 C1.0 R2.5 zone on the northern portion of the site fronting onto Queen Street West, as well as to amend the current I1 D3 zone on the southern portion of the site, to permit the development of a 10-storey residential building, with retail at grade, on the northern portion of the site fronting onto Queen Street West as well as a 26-storey residential building on the southern portion of the site on lands located at 1171 and 1171R Queen Street West

O.M.B. Case No. PL051203

O.M.B. File No. Z050191

Verdiroc Development Corporation has appealed to the Ontario Municipal Board under subsection 22(7) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended, from Council's refusal or neglect to enact a proposed amendment to the Official Plan for the former City of Toronto by introducing a site-specific policy to the current "Mixed Industrial-Residential Area B" designation in the Garrison Common North Part 2 Plan for the purpose of permitting the proposed development of a 3-storey building containing 5 live-work units, a 19-storey residential building on the southern portion of the subject lands and a 25-storey residential building containing live-work units at grade on the eastern portion of the subject lands on property municipally known as 48 Abell Street

Approval Authority File No. 99 036168 SHY 18 OZ

O.M.B. Case No. PL060087

O.M.B. File No. O060039

Verdiroc Development Corporation has appealed to the Ontario Municipal Board under subsection 34(11) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended, from Council's refusal or neglect to enact a proposed amendment to Zoning By-law 438-86, as amended, of the former City of Toronto to permit, as an exception to the current "I1 D3" zone, a proposed

development on lands municipally known as 48 Abell Street to consist of a 3-storey building containing 5 live-work units, a 19-storey residential building on the southern portion of the subject lands, and a 25-storey residential building containing live-work units at grade on the eastern portion of the subject lands

O.M.B. Case No. PL060087

O.M.B. File No. Z060009

Landmark Developments Inc. has appealed to the Ontario Municipal Board under subsection 22(7) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended, from Council's refusal or neglect to enact a proposed amendment to the Official Plan for the former City of Toronto by introducing a site-specific policy to the current "Mixed Industrial-Residential Area B" designation in the Garrison Common North Part 2 Plan for the purpose of permitting the proposed development of a 16-storey residential building and 3 rows of 5 ½-storey residential buildings in stacked townhouse form, which now has been revised to a proposal to consist of 2 residential buildings, ranging in height from 6 to 13 storeys, to frame a central landscaped open space with the west building at 6 storeys at the street edge (18 metres), stepping back an additional 2 storeys for a total height of 24 metres and the east building at 6 storeys at the street edge, stepping back to 8 storeys and again to 10 storeys for a total height at the south end of the building of 36 metres on lands municipally known as 150 Sudbury Street

Approval Authority File No. 05 199171 STE 18 OZ

O.M.B. Case No. PL060443

O.M.B. File No. O060093

Landmark Developments Inc. has appealed to the Ontario Municipal Board under subsection 34(11) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended, from Council's refusal or neglect to enact a proposed amendment to Zoning By-law 438-86, as amended, of the former City of Toronto to permit, as an exception to the current "I1 D3" zone, a proposed development on lands municipally known as 150 Sudbury Street to consist of a 16-storey residential building and 3 rows of 5 ½-storey residential buildings in stacked townhouse form, which now has been revised to a proposal to consist of 2 residential buildings, ranging in height from 6 to 13 storeys, to frame a central landscaped open space with the west building at 6 storeys at the street edge (18 metres), stepping back an additional 2 storeys for a total height of 24 metres and the east building at 6 storeys at the street edge, stepping back to 8 storeys and again to 10 storeys for a total height at the south end of the building of 36 metres

O.M.B. Case No. PL060443

O.M.B. File No. Z060066

Westside Lofts and Towns Inc. has referred to the Ontario Municipal Board under subsection 41(12) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended, determination and settlement of details of a site plan for lands composed of Part 1, Plan 66R-17443, Part of Ordnance Reserve and Part of Abell Street, municipally known as 150 Sudbury Street

O.M.B. Case No. PL060443

O.M.B. File No. M060056

APPEARANCES:

Parties

Counsel

Verdiroc Development Corporation and
Abell Investments Limited (Owners)
(48 Abell Street)

D. Bronskill

City of Toronto

D. Jubb

Active 18 Community Association

C. Campbell

2059946 Ontario Limited and Bohemian
Embassy Residences Inc. (Owners)
(Re 1171 Queen Street West)

R. Kanter

Landmark Developments Inc. (Owner)
(Re 150 Sudbury Street)

A. Paton

Canadian National Railway Company and
Greater Toronto Transit Authority

M. Hackl

(The owners of the above three properties
are collectively referred to as the
"Applicants")

**DECISION OF THE BOARD DELIVERED BY H. GOLDKIND, J. CHEE-HING
AND S.J. STEFANKO**

I. NATURE OF MOTION

The City of Toronto ("City") has brought a motion pursuant to section 43 of the *Ontario Municipal Board Act* ("Section 43 Motion") requesting review and rehearing of each of Board Decisions No. 0052, No. 0053 and No. 0054 issued on January 10, 2007. The Board decisions were issued, following 35 full days of hearing, by Vice-Chairman, D.R. Granger.

The Board dealt with three appeals regarding three separate applications for three properties, known as 1171 Queen Street West ("Bohemian Site"), 150 Sudbury Street ("Sudbury Site") and 48 Abell Street ("Abell Site").

At the impugned hearing and on consent of the parties, the Board had heard the three appeals, one following the other. The evidence common to the immediate area, known as the West Queen Street West Triangle ("Triangle") and to all appeals was heard at the start of the hearing, with evidence specific to each appellant, following. Three separate decisions ("Decisions") followed which contained findings specific to each application as well as general findings common to all three sites.

The Decisions amended the Official Plan of the former City of Toronto and the Zoning By-law of the former City of Toronto, being the in-force Official Plan and By-law applicable to the appeals before the Board, to incorporate the Decisions of the Board. The Decisions of the Board provide a greater intensity of residential use than permitted under the above Official Plan and Zoning By-law, with provision for non-residential use, live-work use, and the height and massing of buildings. The Board withheld its Orders respecting these Decisions pending the successful completion of certain agreements between the landowners and the City; including the finalization of a Section 37 agreement under the *Planning Act*, and the acquisition of parkland by the City. The Board set a time limit for resolution of these matters.

II. BACKGROUND

The three subject sites are generally bounded by Queen Street West, on the north; by Abell Street on the east, and by the CN Rail Corridor on the south. These lands are part of a larger parcel of land which is referred to as the West Queen West Triangle. The subject lands are vacant except for a building at 48 Abell Street.

The parties acknowledge that the subject sites are "brownfield" lands, with little if any residential or non-residential use.

For the sake of clarity, this panel finds that these lands are subject to the following planning documents, in addition to the *Planning Act*:

- 1997 Provincial Policy Statement
- Official Plan of the former City of Toronto ("Official Plan")
- Garrison Common North Part II Plan ("Garrison II Plan")
- The Official Plan of the former Municipality of Metropolitan Toronto ("Metro Plan")

The subject sites comprise about 2.4 hectares and comprise about 1.5% of the approximate 160 hectares of the Garrison Common North Part II Plan area.

III. APPLICABLE LEGISLATION

The statutory provisions which are central to the matters before this panel on this motion are s.43 of the *Ontario Municipal Board Act* and Rules 112 and 115 of the Board's Rules of Practice and Procedure. They read as follows:

s.43. Power to rehear, review etc.

The Board may rehear any application before deciding it or may review, rescind, change, alter or vary any decision, approval or order made by it.

112. Board's Powers on Review The Board may rehear any application before deciding it or may review, rescind, change, alter or vary any decision, approval or order. It may order a rehearing of the whole or part of the matter before a different Member.

115. Reasons for Review The Board will hear a motion to review a decision only if the reasons provided in the request raise an arguable case that the Board,

- (a) Acted outside its jurisdiction;
- (b) Violated the rules of natural justice or procedural fairness, including those against bias;
- (c) Made an error of law or fact such that the Board would likely have reached a different decision;
- (d) Heard false or misleading evidence from a party or witness, which was discovered only after the hearing and could have affected the result; or

- (e) Should consider evidence which was not available at the time of the hearing, but that is credible and could have affected the result.

IV. ISSUES

The issues that require our adjudication at this motion are as follows:

- (A) In relation to the Section 43 Motion, has one or more of the matters set out in Rule 115 been established?
- (B) If the answer to Issue IV(A) is yes, what relief should be granted by this panel?

V. POSITIONS OF THE PARTIES AND ANALYSIS

- (A) Rule 115(a): Did the Board act outside its jurisdiction?

The City maintains that the Board acted outside of its jurisdiction by not taking into account Section 16.4 of the Official Plan and Section 2.3 of Garrison II Plan.

Official Plan

s.16.4. Part II Study for Large Developments

Notwithstanding any other provision of this Plan, Council will consider large scale development proposals which may have a major impact on the structure or character of the City, or which may alter the form of streets and/or blocks of the City, only in light of a study of the area undertaken for the purpose of recommending policies for adoption in Part II of this Plan. Council will not make any amendments to the Zoning By-law to permit such development without first adopting such policies as may appear necessary in light of the study, in Part II of the Plan.

Garrison II Plan

s.2.3 Further to the above policies, Council shall ensure that redevelopment of large sites of 1 hectare or more are well integrated with the surrounding neighbourhoods. To achieve this aim, Council shall seek the provision of good

pedestrian, vehicular and visual connections to adjacent neighbourhoods, *parks* and *open spaces*.

The City contends that these developments, individually or collectively, comprise a large scale development and require a prior area study to be undertaken and adopted by the City Council along with changes to Part II of the Plan as necessary before the City could enact a zoning by-law to permit such development. The City also maintains that the projects comprise a "large" project by reason of Section 2.3 of GARRISON II PLAN since 150 Sudbury is just over 1 hectare and the sites collectively exceed 1 hectare. The City also relies on Section 24(1) of the *Planning Act*, which provides:

24(1) Despite any other general or special Act, where an Official Plan is in effect no public work shall be undertaken and, except as provided in subsections (2) and (4), no by-law shall be passed for any purpose that does not conform therewith.

Counsel for the City submits that the Board assumes the jurisdiction of and restraints on the municipal council on an appeal and is therefore prevented from changing the Zoning By-law to permit the proposed developments until the provisions of Section 16.4 of the Official Plan are completed and adopted by the City. An area study was in progress during the Board's hearing of the appeals. The area study was initiated after the development applications were submitted.

The Applicants submit that the projects have to be individually judged and as such are not large projects and alternatively, do not comprise a large project even if regarded collectively, since they comprise a small part of the Garrison II Plan area. The Applicants contend that section 2.3 of Garrison II Plan does not constitute a definition for a large scale development.

The Applicants argue that the proposed developments do not satisfy the tests, for requiring an area study, set out in section 16.4 of the Official Plan. In this regard, the Applicants argue that the project must not only be a large scale development, but must also "have a major impact on the structure or character of the City, or which may alter the form of streets and/or blocks of the City."

The City also submitted that there was a failure of the Board to have regard to the requirement of sections 1.1, 2, 3 and 24 of the *Planning Act* (matters of Provincial interest and Official Plan policies).

Findings of Panel on alleged violation of rule 115(a)

- (i) Sections 1.1, 2, and 3 and 24 of the *Planning Act* were not shown by the City to be matters relating to a violation of Jurisdiction. If applicable, these relate to rule 115(c).
- (ii) With regard to section 16.4 of the Official Plan, it is the finding of this panel that the proposed developments, separately and collectively, do not meet the tests for requiring an area study by the City and adoption of same into the Part II Plan prior to development being permitted, for the following reasons:
 - (a) The proposed development site is not a "large scale development which will have a major impact on the structure or character of the City, or which may alter the form of streets and/or blocks of the City." In terms of the scale of the proposal and the proportionality to the planning fabric the proposed development site is a small part of the Garrison II Plan area.
 - (b) The proposed developments will not have a major impact on the structure or character of the City. Plan 19.10, attached to the Garrison II Plan shows the subject site along with the roads which define its transportation system and boundaries. The proposed developments will implement this part of the Garrison II Plan since the developers are constructing large sections of Sudbury Street and Abell Street as shown on the Part II Plan as part of their development proposals. Accordingly, the development proposals will only alter the existing streets by building the streets shown in the Garrison II Plan, thereby implementing the Part II Plan.
 - (c) Section 2.3 of the Garrison II Plan does not define large scale development sites.

Accordingly, this panel finds that the Board in making its Decisions on these projects did not act outside of its jurisdiction.

(B) Rule 115(b) Violated the Rules of Natural Justice or Procedural Fairness

The Board hearing took 35 full days. The Board heard from the City's witnesses and the applicants' witnesses. All of the parties acknowledge that they were given a full and fair hearing by Vice-Chairman Granger.

However, the City contends that the Decisions fail to satisfy the legal requirement for sufficient reasons in rendering its decisions, so that the City could properly evaluate the Decisions for the purpose of appellant review. In that regard, the City submits that the Decisions do not show proper or sufficient regard and reference to the following documents:

- (i) Section 2 of the *Planning Act* (matters of Provincial interest);
- (ii) Section 3 of the *Planning Act* (Provincial Policy Statements issued in 1997 or 2025);
- (iii) "In force" Official Plan of the former Municipality of Metropolitan Toronto (Planning Policies);
- (iv) "In force" Official Plan of the former City of Toronto and the Garrison Common North Part II Plan;
- (v) The new City of Toronto Official Plan, the new Garrison Common North Secondary Plan and the *Places to Grow Act*.
- (vi) Issues raised in Consolidated Issues List.

The City submits that the Decisions do not show sufficient reasons for the Board's changes to the Official Plan and Zoning By-law in relation to the above planning documents and the issues set out in the Consolidated Issues List.

The City acknowledges that it is not necessary to analyze each proposal or application under separate headings in relation to every issue including every relevant section of the above planning documents, yet it argues that all important issues and statutes must be identified and analyzed. In that regard the City identifies the above planning documents and various sections thereof for detailed analysis.

The Applicants submit that the Decisions have been rendered in a reasonable form, and that the Board is not mandated to separately deal with each issue on the consolidated Issues List, and all relevant sections of all planning documents.

Findings of the Panel

This panel finds that:

- (i) The Consolidated Issues List contains the issues which each party thinks is relevant to its position. The Board is only required to deal with those issues which the Board itself finds relevant, and the Board is to decide on which planning documents are relevant and how they are to be applied and referenced.
- (ii) The Decisions identify and reasonably deal with the main issues, including:
 - (a) the maximum height, and massing of buildings, including step-backs;
 - (b) the minimum amount of non-residential space to be provided in each project;
 - (c) provision for financially assisted residential and non-residential work space;
 - (d) agreements to be entered into by the parties pursuant to section 37 of the *Planning Act* to provide for public benefit payments from the developers in exchange for greater density.
 - (e) Residential use including affordable housing.

- (f) The provision of parkland, to be acquired by the City at the expense of the developers.
- (iii) The Board identified that an area of major concern to the City is the preservation of mixed-use non-residential space. The City proposed a density formula to be applied to each building for the preservation of employment use space. This was referred to as a "no-net-loss policy" The Board discussed this issue in some detail and acknowledged the importance of setting aside sufficient employment space for a variety of employment uses. The Board rejected the proposed formula of the City and gave its reasons.

The Board recognized the importance of providing space for a variety of employment uses, including creative industries, and provided for specific spaces to be reserved for "non-residential uses including affordable live/work artists studios where subsidy is available." These spaces are on ground floors related to Queen Street, Abell Street and the "Mews" within the projects.

- (iv) The Decisions are not framed with reference to each relevant section of each planning document. However, the Decisions are made in the context of the relevant planning domain. The Vice-Chair, in the Decisions, set out that, "it must point out its obligation to carefully consider the evidence in the context of the existing statutory and policy framework." The Decisions deal with and provide, in terms of substance, matters of provincial and municipal interest and benefit which are contained in the relevant statutory and policy framework.

In relation to providing sufficient reasons in the Decision, this Panel is guided by:

Her Majesty The Queen v. Colin Sheppard (2002) 1 S.C.R. 869, Binnie J., on the issue of the duty of a trial judge to give sufficient reasons upheld the Newfoundland Court of Appeal which held in part at p.871,

The trial judge's duty is satisfied by reasons which are sufficient to serve the purpose for which the duty is imposed, i.e., a decision which having regard to the particular circumstances of the case, is reasonably intelligible to the parties and provides the basis for meaningful appellant review of the correctness of the trial judge's decision.

At p.873, Justice Binnie referred to the trial judge as having "erred in law" in failing to provide an explanation of his decision that was sufficiently intelligible to permit appellate review.

This panel finds that the Decisions given by the Board were reasonable and provided sufficient reasons. Any reasonable reading of the Decision will lead to the conclusion that the Board has adequately and intelligently addressed the relevant issues it countenanced. There has not been a violation of rule 115(b).

In addition to the foregoing, this Panel is also of the view that the issue of the adequacy of the Decisions is the only matter relevant to rule 115(b).

(C) Rule 115(c). Made an error of law or fact such that the Board would likely have reached a different decision.

In relation to Rule 115(c), the City submitted that the Decisions failed to give sufficient weight to the in-force zoning by-law, failed to sufficiently consider planning legislation and policy documents and matters of public interest, erred in finding that the City's Official Plan had a "no net loss policy" for employment uses and erred in saying that the City acknowledged that "Employment Districts" within the City offered the best long term protection of employment lands for employment uses.

In relation to these matters alleged by the City, this Panel finds:

- (i) The Board considered relevant planning legislation and policies in making the Decisions, and this is reflected in the Decisions, including the public benefits enumerated.
- (ii) The Board identified and analyzed the important issues, such as the provision of a variety of residential and non-residential uses, and the provision of a number of public benefits.

- (iii) The Decisions did not attribute the City's "no net loss policy" for employment uses to the City's in-force Official Plan, as submitted by the City.
- (iv) If the Board erred in finding that the City acknowledged that, "Employment Districts" within the City offered the best long-term protection of employment lands for employment uses; this is not an error such that the Board would likely have reached different Decisions.

This panel finds no violation of Rule 115(c).

Based on all of the foregoing, this panel finds that there are no violations of Rule 115 of the Ontario Municipal Board Rules of Practice. The Decisions are reasonable in our view and provide sufficient reasons. The important issues have been identified, examined and dealt with. If there have been any errors they are of a minor nature and would not have affected the Decisions.

The Motion under s.43 of the *Ontario Municipal Board Act* is therefore dismissed.

It is So Ordered.

"H. Goldkind"

H. GOLDKIND
MEMBER

"J. Chee-Hing"

J. CHEE-HING
MEMBER

"S.J. Stefanko"

S.J. STEFANKO
MEMBER