

Divisional Court File No. 79/2007

**Ontario Municipal
Board No.**

PL051203

PL060087

PL060443

**ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)**

BETWEEN

CITY OF TORONTO

Applicant

-and-

**2059946 ONTARIO LIMITED, VERDIROC
DEVELOPMENT CORPORATION, LANDMARK
DEVELOPMENTS, INC., WESTSIDE LOFTS AND TOWNS
INC, EMBASSY RESIDENCES INC., ACTIVE 18
COMMUNITY ASSOCIATION, ABELL INVESTMENTS
LIMITED, CANADIAN NATIONAL RAILWAY COMPANY,
GREATER TORONTO TRANSIT AUTHORITY**

Respondents

**FACTUM OF THE RESPONDING PARTY
ACTIVE 18 COMMUNITY ASSOCIATION**

March 28, 2007

Iler Campbell LLP
Barristers and Solicitors
890 Yonge Street Suite 700
Toronto, Ontario
M4W 3P4

Charles Campbell
Telephone: (416) 598-0103
Facsimile: (416) 598-3484

Solicitors for Active 18
Community Association

TO: City Solicitor's Office
City of Toronto
Station 1260, 26th Floor, Metro Hall
55 John Street
Toronto, Ontario M5V 3C6

Diana W. Dimmer
LSUC # 24932L
Telephone: (416) 392-7229
Facsimile: (416) 392-1199

Thomas H. Wall
LSUC # 21171P
Telephone: (416) 392-1561
Facsimile: (416) 392-1199

Solicitors for the Moving Party, City of Toronto

AND TO: Andrew Paton, Q.C.

181 University Avenue, Suite 2200
Toronto, Ontario M5H 3M7

Telephone: (416) 644-1288
Facsimile: (416) 644-1289

Solicitors for Landmark Developments Inc.

AND TO: Goodmans LLP

250 Yonge Street, Suite 2400
Toronto, Ontario M5B 2M6

David Bronskill
Telephone: (416) 597-4299
Facsimile: (416) 979-1234

Solicitors for Verdiroc Development Corporation and
Abell Investments Limited

AND TO: Macdonald Sager Manis LLP

150 York Street, Suite 800
Toronto, Ontario M5H 3S5

Ronald M. Kanter
Telephone: (416) 361-2619
Facsimile: (416) 364-1453

Solicitors for 2059946 Ontario Inc. and Bohemian Embassy Residences Inc.

AND TO: Papazian Heisey Myers
Standard Life Centre, P.O. Box 105
121 King Street West, Suite 510
Toronto, Ontario M5H 3T9

Michael Hackl
Telephone: (416) 601-2704
Facsimile: (416) 601-1818

Solicitors for Canadian National Railway Company and Greater Toronto
Transit Authority

Divisional Court File No. 79/2007

**O.M.B. No.
PL051203,
PL060087,
PL060443.**

**ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)**

BETWEEN

CITY OF TORONTO

Applicant

And

**2059946 ONTARIO LIMITED, VERDIROC
DEVELOPMENT CORPORATION, LANDMARK
DEVELOPMENTS, INC., WESTSIDE LOFTS AND TOWNS
INC, EMBASSY RESIDENCES INC., ACTIVE 18
COMMUNITY ASSOCIATION, ABELL INVESTMENTS
LIMITED, CANADIAN NATIONAL RAILWAY COMPANY,
GREATER TORONTO TRANSIT AUTHORITY
Respondents**

FACTUM OF ACTIVE 18 COMMUNITY ASSOCIATION

Part I - INTRODUCTION

1. Active 18 Community Association is an incorporated neighbourhood organization of 200 members. It was a full party at the Ontario Municipal Board ("Board") Hearing in question, represented by Counsel at every day of the Hearing. It presented its own witnesses, opposing and sometimes supporting the City and the three developers.
2. Active 18 supports the position of the City of Toronto in its application that Leave to Appeal the decisions of the Board in PL051203, PL060087 and PL060443 should be granted.

3. Active 18 adopts the summary of Facts set by the City in its Application for Leave, subject to the additional facts set out herein.
4. Active 18 supported reasonable new construction on the lands in question, reflecting the densities and uses set out in the Official Plan and related zoning. It sought to ensure that the new construction would be mindful of the need for employment in the downtown and the Triangle area, mindful of the suitability of this area for 'creative industries' uses, the need for adequate parks for new neighbours and the need for good design.
5. Active 18 stressed the local importance of arts-related employment as the local variant of 'creative industry' but certainly not as the only type of employment that needs space.
6. Active 18 previously filed three Notices of Leave to Appeal from the three Decisions before the Court in this Application. Rather than pursue those matters separately Active 18 supports the City's Application for Leave and would abandon its independent applications.
7. The issues raised have substantial importance to the City's employment policies. The effect of the decision is to render largely ineffective all mixed use categories of planning and zoning. The effect of the decision is to brush aside maximum density provisions in the Official Plan and Zoning By-law. The result is a massive increase in residential density from that permitted.
8. Active 18 submits that the following are issues and errors of law that should be reviewed on appeal to the Divisional Court:
 - 1) it failed "to have regard to" matters of provincial interest (Section 2 of the *Planning Act*) and to ensure that the decision was "consistent with" the

employment policies in the Provincial Policy Statements (Section 3 of the *Planning Act*);

- 2) it applied the new Official Plan to a case where the old Official Plan is the applicable planning document;
- 3) it failed to apply the old (in force) Official Plan policies on density without adequate justification or reasons for ignoring these policies;
- 4) it failed to apply the old (in force) Official Plan policies on mixed use without adequate justification or reasons for ignoring these policies;
- 5) it failed to properly consider the public interest by ordering less artist live/work space than offered by the 48 Abell project and
- 6) it failed to provide sufficient reasons for the decision.

Part II – THE FACTS

A The Scheme of the Act

9. The *Planning Act* provides a complex and multilayered decision-making process for planning in the Province. The Ontario Municipal Board, a statutory tribunal, is obliged to review all appeals and applications in a manner which promotes the purposes of the Act.
10. Section 1.1 provides that the purposes of the Act include:
 - a) to promote sustainable economic development in a healthy natural environment ...
 - b) to provide for a land use planning system led by provincial policy;
 - c) to integrate matters of provincial interest in provincial and municipal planning decisions;
 - d) to recognize the decision-making authority and accountability of municipal councils in planning. (1994, c. 23, section 1)
11. A municipality must have an Official Plan. The Official Plan “shall contain the goals and objectives and policies ...” The plan must have “regard to” provincial interests (Section 2) and “be consistent with” Provincial Policies. (Section 3).

Planning Act, Sections 14.7(3), 16(1)(a), (24)

12. The Official Plan itself provides that “Municipal by-laws, including zoning bylaws ... will conform to the Official Plan.Amendments to this Official Plan that are not consistent with its general intent will be discouraged”

Motion Record of the Applicant, Tab 30

Official Plan, City of Toronto, Section 5.3.1 and 5.3.3

B) Employment Issues

13. The West Queen West area is the informal name of part of the Garrison Common North Secondary Plan planning district. The three properties in issue here are part of an area within that district referred to as ‘the Triangle’, bounded by Queen St West, Dovercourt Road and the railroad tracks which run north west.
14. The West Queen West area (including the Triangle) is a truly mixed use area which includes residential, office space, studio space, exhibition space, light industry, live-work artist space. This mix is crucial to the success of the ‘creative industries’ as they often rely on collaboration between individuals. The evidence of Vera Frankel, a noted Canadian video artist, on the importance of the ‘mix’ to the employment in the neighbourhood, was undisputed.

Motion Record of Applicant, City of Toronto,

Tab 23, p. 544 – Witness Statement of Kyle Benham;

Tab 29 Statement of Vera Frenkel

15. One important aspect of ‘the mix’ is the existing building at 48 Abell. It is an old industrial building. Its 80 units of which are uniquely suited to arts uses. It is to be torn down to make way for the two new proposed buildings at that site. The loss of this employment related space was the focus of considerable evidence. Active 18 did not oppose reasonable new construction in the Triangle but sought to preserve the mix of uses and thus the character of the neighbourhood.

Motion Record of Applicant,

Vol. 3, Tab 28, Evidence of Jessica Rose

16. The 'creative industries' is a significant employment sector in the City as a whole and they have a greater economic impact than a number of other employment sectors. The evidence demonstrated that artistic endeavours, i.e. painting, performance, dance, and sculpture, are one aspect of 'creative industries' which would also include i.e. architecture, design, film, and book and periodical publishing. The West Queen West area, including the Triangle, is a hub of creative industry in the city, with 31% of the total employment in the Triangle involved in creative enterprises.

Motion Record of the Applicant**Tab 23, p. 543-4 - Witness Statement of Kyle Benham**

17. By failing to preserve space for general employment, and particularly for the growing sector of the creative industries in an area like the Triangle where they are strong, the Board's decision is *not* consistent and does *not* have regard to the applicable Provincial Policy Statements.
18. The Board says that "areas designated as exclusively Employment within the City offered the best long term protection of employment lands for employment uses." Although provincial and municipal policy documents protect Employment Areas from residential conversion these are not the only ones where protection is found. It is not true that Employment Areas are the only, or even the preferred method for encouraging employment growth, especially regarding creative industries. Other areas are similarly worthy, or even more worthy, of protection. Creative industries, in particular, thrive in mixed use areas such as the West Queen West neighbourhood. The evidence showed that space for employment in the creative industries sector is best located in mixed use areas.

Motion Record of the Applicant,**Tab 3B, p. 45 - Decision, Re 48 Abell, (p. 5); (All references are to**

the 38 Abell decision. All decisions are the same on the general 'macro' issues.)

Tab 29, (Volume 3), Evidence of Vera Frenkel,

Tab 24 Evidence of Meric Gertler. P 573, 574, 582 and 583

C) In-force and New Official Plan

19. As per OMB decision no. 1928, dated July 6, 2006, these appeals should *not* be subject to the (2002) Toronto Official Plan ("new OP"). Consequently, these appeals were to be heard and decided under the City of Toronto Official Plan ("in-force OP") and the Official Plan of the Municipality of Metropolitan Toronto ("Metro Plan").

Motion Record, of the Applicant,

Tab 8 , p. 196, 199-201 – Ontario Municipal Board Decision No. 1928

20. It is undisputed that the Board ruled the case would be not be decided under the new Official Plan and strongly discouraged the parties from presenting evidence about it.

21. However, the Board did apply the new OP in order to ignore the mixed use policies in the in-force OP.

The Board notes the City's reliance on a mix of residential and employment uses under the policies of the old [in-force] OP. No similar policies were presented suggesting some minimum amount of non-residential land use being applied in the new OP.

In fact there are policies in the new Official Plan that stress mixed uses.

Motion Record of the Applicant,

Tab 3B, p. 47 - Decision, Re 48 Abell (p. 7)

22. The new OP expressly requires an area study for a larger area including the Triangle in accordance with its "regeneration" policies (Section 4.7.2) and for the Triangle in particular under the Garrison Common North Secondary Plan (Section

10.2). Conclusions from this area study were included in the Request for Direction Report – Official Plan and Zoning Review in the West Queen West Triangle Area, dated May 30, 2006. It should be noted, however, that it has not yet been implemented in the form of an Official Plan Amendment. Council recommended Official Plan amendments that required the protection of employment space and the mixed use character of the neighbourhood in the form of the “no net loss” policy. One of these amendments required the maintenance of approximately 40,000 sq m of non-residential space in the Triangle. The new OP and the pending amendments both had policies protecting the mix of residential and employment uses in this area.

Motion Record, of the Applicant

- Tab 7, p. 188 - City of Toronto New Official Plan,**
- Tab 9, p. 205 - - New Garrison Common North Secondary Plan**
- Tab 14, p. 296 Request for Direction Report – Official Plan
and Zoning Review in the West Queen West Triangle Area;**
- Tab 26, City Council Report, September 25 – 28, 2006, (Exhibit 72A)**
- Tab 30, City of Toronto New Official Plan, Section 5.6.1**

23. There *are* mixed use designations in the new OP. For example, “Regeneration Areas” are mixed use areas as they are to be comprised of “a broad mix of commercial, residential, light industrial, parks and open space, institutional, live/work and utility uses...” (Section 4.7).

Motion Record of the Applicant,

- Tab 7, p. 188, 186 - City of Toronto New Official Plan**

D) Maximum Density

24. The density numbers contained in the OP are the in force numbers. Section 16.7 of the OP states:

All numerical figures in the Plan, except those indicating density, should not be interpreted as absolute and rigid. Minor variations from them will be tolerated providing the intent and spirit of the Plan is maintained.

There is no planning rationale in the reasons for the alteration of density numbers. Indeed the Board did not even know what the resulting density from its decision would be.

Motion Record of the Applicant

Tab 31 City of Toronto Official Plan s. 16.7

Reasons p. 10.

25. The density numbers in the in-force Official Plan are as follows:

The strip running along the south side of Queen St. W. is a mixed commercial-residential ("MCR") area. This area only affects the north building and a very small portion of the south building of the 1171 Queen project. The maximum densities are 2.5x coverage, if exclusively residential, or 1.5x coverage, if exclusively commercial and/or institutional. The permitted density of mixed use buildings is 2.5x residential and 1.5x commercial/institutional to a maximum of 3.0x coverage.

Motion Record of the Applicant

Tab 31, City of Toronto Official Plan, s. 13.3;

Tab 32, Garrison Common North Secondary Plan, section 3.6

26. The remainder of the Triangle is a mixed industrial-residential ("MIR") zone with a maximum density of 3.0x coverage. The maximum densities are 2.0x, if exclusively residential, or 3.0x coverage, if exclusively industrial. The permitted density of mixed use buildings is 2.0x residential and 1.0x industrial up to a maximum of 3.0x coverage

Motion Record of the Applicant,

Tab 4, p. 110, City of Toronto Official Plan, section 9.40

**Tab 6, p. 134, Garrison Common North Secondary
Plan, s. 3.12].**

27. The Zoning By-law provides for 2.5x residential and 1.0x commercial to a maximum of 3.0x coverage in the MCR area. The zoning for the majority of the Triangle is purely light industrial with a maximum density of 3.0x coverage.

Motion Record of the Applicant,

Tab 10, p. 227 - Zoning By-law 438-86

28. The densities permitted by the Board are 4.29x for the 1171 Queen project, 4.59x for the 48 Abell project and 2.78x for 150 Sudbury. The total density for the three sites is 3.75x. Only 150 Sudbury is below the permitted maximum density in the area. However, its purely residential density 2.70x still exceeds the permitted residential density. The other projects are even more intense, at 4.08x residential density for 1171 Queen and 4.45x residential density for 48 Abell.

Motion Record of the Applicant,

Tab 27, p. 664 - Affidavit of Elise Hug

E) Mixed Use

29. The Triangle is a mixed use area. The in-force OP designates the Triangle as both an MCR and, predominantly, MIR area and supports those designations with fixed density numbers that required a mix of uses as described above.

Motion Record of the Applicant

Tab 31 City of Toronto Official Plan, section 13.3;

Tab 32, Garrison Common North Secondary Plan, section 3.6

Tab 4, p. 110 - City of Toronto Official Plan;

Tab 6, p. 134 - Garrison Common North Secondary Plan

30. The in-force OP policies require 1.0x industrial space to reach the maximum density of 3.0x coverage. This translates into a required ratio of 2/3 residential to 1/3 non-residential in any development of 3.0x. However, if increased total density is permitted by the Board, this ratio should be carried forward.

Motion Record of the Applicant,

2.35

Tab 4, p 109 – 110, City of Toronto Official Plan

31. At the hearing, the City proposed a reduced requirement of non-residential space called the “no net loss” policy. It was based on the policy of maintaining 40,000 sq m of non-residential space in the Triangle which translated into a requirement of 0.7x non-residential space in any building equal to or greater than 2.7x coverage. This policy was a compromise; a reduction of what was required by the in-force OP.

Motion Record of the Applicant,

**Tab 14, p. 296 - Request for Directions Report – Official
Plan and Zoning Review in the West Queen West
Triangle Area;**

Tab 3B, p. 46, Decision, Re 48 Abell, (p. 6)

32. The Board found that the ‘no net loss’ policy was inadequate since it found “no basis for quantifying a specific amount for each site based on a general poorly defined no net loss policy basis.” The Board insisted that “more work must be done to establish defensible policies” and that such policies must be based on “objective criteria and data achieved through some comprehensive analysis of the planning Area...” The Board found that there was “no basis for an across the board amount of non-residential land use per site ...” In doing so, the Board failed to even consider the plain meaning of the in-force OP requirements of an ‘across the board amount of non-residential land use per site’ within the Triangle. More important, if the ‘no net loss’ compromise was to be rejected, the Board failed to return” to the basic in-force OP requirements still in place, as spelled out in paragraph 27 above.

Motion Record of the Applicant,

Tab 3B, p. 47, Decision, Re 48 Abell, (p. 7)

33. The Board goes on to find that notwithstanding there being no basis for any across the board requirement of non-residential land use per site, “in the circumstances

of the case, and balancing the interests of the parties as presented” there should be some required non-residential uses “including affordable live work artist studios where subsidy is available”. The locations identified for the non-residential space are the street and mews frontages.

Motion Record of the Applicant,

Tab 3B, p 47, Decision, Re 48 Abell (p. 7)

34. One of the reasons the Board rejects the no net loss policy is because the City planner was “inconsistent” in saying it would be acceptable to have 0.5x coverage for the 48 Abell project instead of the 0.7x standard otherwise proposed. The Reasons say, “the Board finds this to be an inconsistent approach that could not satisfy with any degree of certainty any employment deficiency alleged to be growing within the City.”

Motion Record of the Applicant,

Tab 3B, p 46, Decision, Re 48 Abell, (p. 6)

35. However, the reasons for the City planner’s compromise are stated in the same paragraph of the Reasons: “... due to special provisions including secured and affordable live/work units and studios and workshop space being proposed.” The 48 Abell project offered thirty-eight affordable live/work spaces in phase one without the requirement of an outside subsidy. Neither the 1171 Queen project nor the 150 Sudbury project proposed any secure, affordable artist work space.

Motion Record of the Applicant,

Tab 3B, p. 46, Decision, re 48 Abell, (p. 6)

36. The Board ordered only live/work studio space one the muse as part of the result “if a subsidy was available”. Thus, the Board rejected 48 Abell’s offer of secured artist studio space that did not require a subsidy and, in fact, required *less* non-residential space than previously proposed by 48 Abell.

Motion Record of the Applicant,

Tab 3B, p. 47, Decision, Re 48 Abell, (p. 7)

Part III – ISSUES AND THE LAW

A) Failure to “have regard to” or “be consistent with” Provincial Policies

37. The proper application of sections 2 and 3 of the *Planning Act* and the proper consideration of matters of provincial interest and Provincial Policy Statements are questions of law. Section 2 requires that decisions of the Board shall “have regard to” matters of provincial interest, *inter alia* Section 2(k), “the adequate provision of employment opportunities.” Section 3 of the *Planning Act* requires that decisions of the Board “shall be consistent with” Provincial Policy Statements (“PPS”). However, given the date of the 48 Abell project application, it is subject to the previous phrasing of section 3 which required decisions to “have regard to” Provincial Policy Statements. Regardless of which standard is to be applied, the Board failed to do either.

Planning Act, R.S.O. 1990, c. P. 13, ss. 2, 3;

Juno Developments (Parry Sound) v. Parry Sound (Town), [1997] O.J. No. 976 (Div. Ct.) at paras. 28-31;

Concerned Citizens of King (Township) v. King (Township), [2000] O.J. No. 3517 (Div. Ct.) at paras. 15-24.

38. There is nothing in the Board’s reasons to suggest it considered the impact of the proposed development on employment notwithstanding that this precise issue was listed as one of the issues to be determined by the hearings. Board’s decision failed to apply provincial interest regarding employment opportunities and the protection of the financial and economic well-being of the municipality. The Board failed to consider the objectives of these principles and what they were designed to protect. The Board failed examine how these development proposals complied with these principles.

Planning Act, *supra*, s. 2 (k), (l)

Concerned Citizens of King (Township) v. King (Township), supra, at para. 23

39. We adopt paragraphs 57 and 58 of the City's factum regarding the test for "have regard to" under section 3 of the *Planning Act*. In this case, the objectives of both PPS to ensure the provision of sufficient land for the current employment needs in this area and to allow for growth in the employment sector in the future are quite clear. Planning for long term employment needs is critical to the economic prosperity of the municipality and the province. The 2005 PPS even requires planning authorities to "promote economic development and competitiveness" in this manner.

Motion Record of the Applicant

Tab 11; p. 233, 235 – 1997 Provincial Policy Statement;

Tab 12, p. 245, 247, 251, 256 - 2005 Provincial Policy Statement

40. The Board failed to have regard to the PPS policies. The proposed developments result in total residential intensification at the expense of employment opportunities despite the evidence that City is not meeting its employment targets and that one of the good opportunities for employment growth is mixed use areas such as West Queen West, an area with a successful track record. There was no way to reconcile the apparent development goal of residential intensification and the PPS. The Board ought to consider whether and what higher purpose the developers' goal served that would permit it to "supersede" the PPS. There was no consideration of any supposed overwhelming importance of residential intensification, or any other goal, such that it would permit these developments to ignore the PPS policies regarding employment.

Re City of London Official Plan Amendment No. 212 (2001), 42 O.M.B.R. 468 (O.M.B.) at para. 16-17

41. The misinterpretation of Provincial policies is an error of law. The Reasons of the Board raise do not even consider these Policies.

C) Applying the New OP

42. In an early procedural ruling, the Board ruled, correctly, that the City's new OP did not apply to these developments and that the hearings would consider the development proposals measured against the old OP.

Motion Record of the Applicant,

**Tab 8, p. 196, 199-201 - Ontario Municipal Board Decision
No. 1928, dated July 6, 2006**

43. Nevertheless, in rejecting the City's concern that the developments should continue to provide a mix of residential and employment uses, held:

"The Board notes that the City's reliance on a mix of residential and employment uses under policies of the old OP. No similar policies were presented suggesting some minimum amount of non-residential land use being applied in the new OP. While the concern of the City staff may be well founded in their experience, more work must be done to establish defensible policies if the City's intent to achieve certain employment targets through mixed-use developments and regeneration areas in the future."

It is submitted that this reason – the absence of any non-residential minimums in the new OP – was both critical to the Board's decision and an irrelevant factor. The Board's reliance on this irrelevant consideration deprived the City and Active 18 of a fair hearing and is an error of law.

Khan v University of Ottawa, (1997) 34 O.R. (3d) 535; para 40, 56 – 58
Greater Toronto Airport Authority v Clergy Properties Ltd, 1997 O.J.
No. 6526, para. 17 - 21

44. In the alternative, *if* it is acceptable to look at the new OP, the Board incorrectly applied the new OP. First, the new OP must be read as a whole. The application of only certain sections is an error in law. Second, if the new OP was applied to the Triangle, it would require an area study to determine the proper mix of

employment and residential. This area study has been completed, but not implemented, and imposes a requirement of up to 0.7x non-residential space in any developments beyond the permitted residential density. Finally, the Board is incorrect in its statement that there are “no similar [mixed use] policies” in the new OP. Both the ‘Regeneration’ and ‘Mixed Use’ designations of the new OP contain a mix of uses. While explicit density mixes, like those required by the in-force OP, are not be found in the new OP, this is because all density numbers will now be contained in the Zoning By-law. These misinterpretations of the new OP are errors in law.

D) Failure to Apply in-force OP provisions on maximum density

45. Section 24 of the *Planning Act* requires that all by-laws passed by a municipality must conform to its Official Plan. The issue of the proper application of the Official Plan policies and the conformity of a proposed development with the existing Official Plan is a question of law.

Planning Act, supra, s. 24; Sch A

Juno Developments (Parry Sound) v. Parry Sound (Town), supra, at paras. 16-18. Tab 6

46. The maximum density numbers in the in-force OP and Zoning by-law are clear. The maximum density for the area is 3.0x coverage. The maximum residential density is 2.0x in the MIR area, the bulk of the Triangle, and 2.5x for the MCR strip along Queen St. W.

Motion Record, (Appl., C. of T.)

Vol 1 Tab 4, p. 110 - City of Toronto Official Plan; Industrial 9.4 OP

Vol 1 Tab 6, p. 134 - Garrison Common North Secondary Plan;

Vol 1 Tab 10, p. 227 - Zoning By-law 438-86;

Vol 3 Tab 31 - City of Toronto Official Plan, section 13.3; - For Mixed Com

Vol 3 Tab 32 - Garrison Common North Secondary Plan, section 3.6. Residential

47. The density numbers contained in the in-force OP are the only numbers in the OP that are “absolute and rigid.”

City of Toronto Official Plan, s. 16.7 – Tab C attached

m 103

48. The failure to apply the maximum densities in the OP is an error in law.

49. It is accepted that the Official Plan can be amended by the Board. However, given the protection offered to in force density numbers in the OP, the Board must provide good reasons to deviate from the maximum density numbers of the in-force OP. The Board fails to even consider density, preferring instead to outline appropriate building forms.

Motion Record of the Applicant,

Tab 3B, p. 50, Decision, Re 48 Abell, p. 10

Tab 31, City of Toronto Official Plan, sect. 16.7

50. The result is a set of projects greatly in excess of the City’s explicit policies on allowable densities.

E) Failure to Apply OP provisions on Mixed Use

51. The same arguments regarding the importance of the OP and the rigidity of density numbers as outlined in above section D) applies to this argument. The in-force OP provisions applicable to the Triangle require a mix of uses.

Motion Record of the Applicant

Tab 4, p. 110 - City of Toronto Official Plan;

Tab 6, p. 134 - Garrison Common North Secondary Plan;

Tab 10, p. 227 - Zoning By-law 438-86;

City of Toronto Official Plan, section 13.3 – Tab C attached;

Garrison Common North Secondary Plan, section 3.6 – Tab D attached

52. The Board failed to give reasons for departing from the in-force OP non-residential requirement. While the Board outlined the difference of opinion between the City planner and the developers' planners regarding the required mix of uses, the Board fails to outline any reasons for choosing one over the other. This failure to give adequate reasons is an error of law.

Gray v. Ontario (Director of Disability Support Program) (2002), 59 O.R. (3d) 364 (C.A.) at para 22;

Vincent v. DeGasperis, [2005] O.J. No. 2890 (Div. Ct.) at para 25

F) The public interest

53. When making any decision, the Board must consider the "safety, welfare and convenience, i.e. interests, of the public." Land use planning decisions must be in the public interest; they cannot simply fulfil the private interests of the parties.

Re Cloverdale Shopping Centre Ltd. et al and Township of Etobicoke et al (1966) 57 D.L.R. (2d) 206 at para 16;

Matakovic v. Sandwich South (Township) Committee of Adjustment (1994) 30 O.M.B.R. 299 at para. 55

54. The welfare of and convenience to the public in job growth in this area was not taken into account. In particular, the Board even rejected an offer of affordable live/work units from the 48 Abell project.

R. v. Sheppard, [2002] 1 S.C.R. 869 at para. 28

G) Insufficient Reasons

55. Natural justice requires the Board to follow the rules of procedural fairness, which includes the duty to give sufficient reasons for rendering its decisions on these matters as required by the common law rules of procedural fairness. The obligation

to provide adequate reasons is not satisfied by merely reciting the submissions and evidence of the parties and stating a conclusion. The case law states that the decision-maker must set out its findings of fact, the principal evidence upon which those findings were based and address the major points in issue. In addition the decision should explain the reasoning process while referencing the findings of fact in sufficient detail to provide the basis for which their conclusions were reached.

***Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para 43;**

***Lee v. College of Physicians & Surgeons (Ontario)* (2003), 66 O.R. (3d) 592 (Div. Ct.) at para 20-22;**

***Siadat v. College of Teachers (Ontario)*, 2007 CarswellOnt 67 (Div Ct.) at para 57-64;**

***Rosedale Golf Association Ltd. v. DeGasperis* (2004), 185 O.A.C. 176, para 6-7;**

***R. v. Sheppard*, [2002] 1 S.C.R. 869 at para. 28**

Part IV ORDER REQUESTED

56. Active 18 therefore submits that Leave be granted.
57. Active 18 submits that the following questions be posed on appeal.
- 1) Did the Board err in failing to 'have regard to' matters of provincial interest or failing to 'have regard to' or decide in a manner consistent with Provincial Policy Statements?
 - 2) Did the Board err by applying the New Official Plan?
 - 3) Did the Board err in declining to apply the maximum density provisions of the in-force Official Plan or by failing to provide reasons for ignoring these policies?

- 4) Did the Board err in declining to apply the mixed use provision of the in-force Official Plan or by failing to provide reasons for ignoring these policies?
- 5) Did the Board fail to properly consider what is in the public interest?
- 6) Did the Board give sufficient reasons for its decision?

Part IV - ORDER REQUESTED

59. The Respondent Active 18 therefore submits that the Motion for Leave be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of March, 2007.

Counsel for Active 18 Community
Association Respondents



Charles Campbell

LSUC #13440W

Tel 416 598 0103

Fax 416 598 3484