PL070056

ONTARIO MUNICIPAL BOARD

Dunpar 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 Etobicoke Zoning Code and By-law 717-2006, of the former City of Toronto to rezone lands respecting 4187 Dundas Street West and 567, 569 and 571 Prince Edward Drive from CG-AV-H and R2 to CG-AV zone with site-specific exception in order to allow for a 10-storey apartment building with 118 units residential development
O.M.B. File No. Z070008

FINAL ARGUMENT

KINGSWAY RESIDENTS AGAINST POOR PLANNING

DECEMBER 14, 2007

Introduction

1. Kingsway Residents Against Poor Planning ["Kingsway"] is an incorporated residents association.

2. Kingsway was granted party status at the initial, and only, prehearing conference in this matter held on May 2, 2006.

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3. At that time, Kingsway advised the Board of the two fundamental planning concerns it had with the development proposal of the applicant/appellant ["Dunpar"]:

   (i) encroachment of its development proposal and its proposed OP designation and rezoning into the residentially-designated, stable, low density neighbourhood community; and

   (ii) exceeding the zoning by-law's 6 storey height limit [5 storeys + 1 story with s. 37 benefits] that had been recently imposed throughout the Dundas Street fronting properties after intensive community consultation as part of a City-lead "Avenue" study.

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Requested Disposition

4. It is respectfully requested that the Dunpar zoning and site plan appeals be dismissed, with costs.

Key Warren Sorensen Opinions/Conclusions

5. When considered in relation to the former Etobicoke Official Plan, which must be read in its entirety, the proposal does not conform with respect to:

   - the proposed building height, which exceeds the absolute maximum height limit of 6 storeys;

     (Policies 4.4.4 & 4.4.5 – Ex.14, Tab 5, p.38 & 39)

   - the proposal to incorporate residential properties to the south of the Commercial-Residential Strip designation, which is permitted without an OPA only if such consolidation is "required to achieve satisfactory development standards" – and if so, only in such cases that are considered on a "comprehensive basis" – neither test being met by Dunpar;

     (Policy 4.4.7 – Ex.14, Tab 5, p.39)

   - the interpretation policies which permit "minor adjustment" in land use boundaries only where the "general intent of this Plan is maintained";

     (Policy 12.1.6 – Ex.14, Tab 5, p.44)

   - the OP's general intent is not maintained by a boundary adjustment that extends the Commercial-Residential Strip, a designation intended to recognize traditional commercial and mixed use areas in a linear pattern along arterial roads (Dundas), to traditional low density residential lands along a collector road (Prince Edward).

     (Policies 4.4 & 4.4.1 – Ex.14, Tab 5, p.38)

6. If considered in relation to the Toronto Official Plan, which must be read in its entirety, the proposal with respect to the proposed southerly extension of the General Commercial-Avenue (CG-AV) zoning along Prince Edward Drive to the south, does not conform to such Plan as such zoning is contrary to:

   - Chapter Two policies for Avenues, which require that "where a portion of an Avenue is designated Neighbourhoods … the policies of Chapter Four will prevail to ensure that any development respects and reinforces the general physical character of established neighbourhoods …";

     (Policy 2.2.3.4 – Ex.14, Tab 6, p.62)

   - Chapter Two policies for Neighbourhoods, which require that "development within Neighbourhoods … will respect and reinforce the

existing physical character of buildings, streetscapes & open space patterns…";

(Policy 2.3.1.1 – Ex.14, Tab 6, p. 66)

- Chapter Four policies for Neighbourhoods, which require that development "respect and reinforce the existing physical character of the neighbourhood, including in particular … height, massing, scale and dwelling type of nearby residential properties; prevailing building types; setbacks of buildings from the street …" - and "No changes will be made through rezoning … that are out of keeping with the physical character of the neighbourhood";

(Policy 4.1.5 – Ex.14, Tab 6, p.81)

- the Official Plan land use boundary between Mixed Use Areas and Neighbourhoods which approximates the depth of Dundas-fronting properties;
(Map 14 – Ex.14, p.93 & Mr. Smith's blow-up, Ex.10, Attachment "B", p.17)

- the modification (by OPA 13, adding policy 277) of the Mixed Use Area boundary to include 571 (but not 569 & 567) Prince Edward; and

(Chapter Seven, Area Specific Policy 277 – Ex.14, p.94)

- the Official Plan Interpretation policies respecting land use boundaries, which provide as follows:

(Policy 5.6.5– Ex.14, p.87)

Boundaries on Maps 13-23 are "general, except where delimited by a defined … area specific policy"	• Area Specific Policy 277 and map delimit such a defined boundary [and specifically exclude 567 & 569 Prince Edward Drive]

Therefore no need to go further into policy, but if Board thinks it necessary…

In all other instances … determined by review of:

a) existing zoning by-laws	• historic commercial zoning on Dundas and part of 571 Prince Edward • Avenue zoning extended to balance of 571 by B/L 717-2006
b) prevailing lots depths	• depth of Dundas-fronting properties, reflected by Official

		Plan mapping
c)	orientation of frontages	• Dundas vs. Prince Edward orientation
d)	lot patterns	• historic irregular Dundas lotting, reflected by Official Plan mapping
e)	land use patterns	• commercial uses on Dundas; residential on Prince Edward

Finally, minor adjustments to boundaries are permitted only "where the intent of the Plan is maintained". For reasons given above, this proposal does not maintain the intent of the Plan.

7. The failure of the proposed development to conform with either Official Plan requires the Board to dismiss Dunpar's appeals. These are substantial planning problems, not mere technical concerns capable of resolution through the application of a broad interpretation of the OP. The proposed zoning amendment is contrary to Section 24(1) of the *Planning Act* and, without an OPA, cannot be approved. What is required by good planning is a less aggressive, substantially scaled-back redevelopment proposal, with its building massing related to Dundas Street.

8. The proposed extension of Avenue zoning south along Prince Edward results in a development that is more a Prince Edward building than a Dundas building. There is no planning basis for such Prince Edward redevelopment. Prince Edward has never been considered suitable for redevelopment, either as a "Commercial-Residential Strip" or an "Avenue", and is entirely inappropriate and not intended for redevelopment of that type. Prince Edward is a historically substandard road allowance functioning as an entrance into the Kingsway neighbourhood from Dundas. It has no "main street" character nor is it contemplated to function as such.

9. Specifically, the proposed redevelopment should be confined to the Dundas-fronting lands (4187 Dundas and 571 Prince Edward), which is the appropriate area for redevelopment. This has been recently reviewed and reconfirmed, through the Avenue public planning process and the adoption and approval of amendments (OPA 13 and By-law 717-2006).

10. The properties at 567 and 569 Prince Edward should remain part of the Neighbourhood and be used for low density housing or other permitted uses in that designation, which will respect and reinforce the existing physical character of the neighbourhood including:

    - height, massing, scale and dwelling type of nearby residential properties, which are generally 2 storey single detached dwellings

- prevailing building types, which are house-form detached buildings
- setbacks of buildings, which generally include substantial front yards, side yards on both sides, and rear yards.

11. The land use planning boundary [which was irregular but intentional] is appropriately located at the lot line between 569 and 571 Prince Edward, and the application of a 45 degree angular plane at this boundary is appropriate to ensure compatibility with the neighbourhood, and to respect and reinforce the existing physical character of the neighbourhood including these matters of height, massing, scale, dwelling type and setbacks.

12. There is no new information or change in circumstance to justify reversing the outcome of the recent Avenue Study public planning process and the approvals of the resulting amendments (OPA 13 and By-law 717-2006).

Weight to be Given to Evidence

13. Warren Sorensen's testimony and opinions ought to be given greatest weight based upon his vast experience in Etobicoke, including being a former Commissioner of Planning and the author of the former Etobicoke OP; his involvement in the Dundas Street West Avenue Study process and public consultation; and his comprehensive analysis, interpretation and application of the various OP policies discussed at this hearing.

14. The testimony and opinions of David Oikawa and Wendy Johncox ought to be given great weight due to their involvement and familiarity with the Dundas Street West Avenue Study process and public consultation, and their in-depth knowledge, interpretation and application of the OP policy framework.

15. Little weight should be accorded to the urban design evidence and opinions of Robert Glover for the following reasons:
    - his very recent and limited retainer;
    - his minimal Etobicoke experience;
    - his lack of any involvement or any input into the design of either the original or revised development proposal;
    - no involvement by him at all in the preparation and public consultation meetings respecting the Dundas Street West Avenue Study;
    - he offered no opinion on the "boundary" issue;
    - he only opined on the urban design aspects of the current Dunpar proposal;

- he was not instructed to nor did he undertake any analysis of any other potential development schemes, including ones that would conform to the OP, the current Avenue's zoning by-law and urban design guidelines;
- he did not suggest that an appropriately designed building could not be built on the site excluding 567 and 569 Prince Edward Drive; and
- based on these points, there was no need to offer an urban design witness to contradict Mr. Glover's testimony.

16. Little weight should be accorded to the planning evidence and opinions of Peter Smith for the following reasons:
    - he was only retained in October, 2006 after development proposal had been revised and the subject of the initial planning staff report and Community Council meeting;
    - his lack of any involvement or any input into the design of either the original or revised development proposal;
    - no involvement by him at all in the preparation and public consultation meetings respecting the Dundas Street West Avenue Study;
    - he only opined on the planning merits of the current Dunpar proposal;
    - he was not instructed to nor did he undertake any analysis of any other potential development schemes, including ones that would conform to the OP, the current Avenue's zoning by-law and urban design guidelines;
    - he did not suggest that an appropriately designed building could not be built on the site excluding 567 and 569 Prince Edward Drive; and
    - he never opined [or was extremely vague] on the issue of OP "conformity".

17. Community members addressed the Board on public night. Their submissions were informed and compelling. The extent of community participation in and reliance upon the Dundas Street West Avenue Study, its urban design guidelines and Zoning By-law were apparent and indicated the community's "investment" in and commitment to the planning and intensification policies of this Avenue area and the related protection of their residential neighbourhood. They oppose the Avenues development encroaching into their neighbourhood. They support intensification along Dundas in accordance with Zoning By-Law 717-2006 and the related urban design guidelines.

Dunpar's Action and Inaction

18. Dunpar's acquisition of lots 567, 569 and 571 Prince Edward Drive and Dunpar's recent demolition of their respective single family houses ought not to influence

this Board into viewing the subject lands as a single vacant development lot with a Dundas Street orientation.

19. All witnesses acknowledged that such demolition action did not alter the historical use and orientation of such lots as forming part of the residential neighbourhood, nor the OP and zoning policies applying to these now vacant lots.

20. Such homes were consistent with the existing scale and character of this residential neighbourhood [which does not include any 4 storey walk-up apartment buildings] and such were not related to the traditional, linear Dundas Street developments.

21. Should this Board deny the Dunpar appeals, 567 and 569 Prince Edward Drive can and ought to be redeveloped in accordance with their "Neighbourhood Area" designation and applicable residential zoning provisions which presently apply to such lots.

22. Despite knowledge of the Dundas Street West Avenue Study and attendance at community consultation meetings, Dunpar never objected [either in an oral or written manner] to the final Study recommendations nor its resultant OPA Special Policy No. 277, its urban design guidelines, nor the Avenue Zoning By-law No. 717-2006.

23. Under such circumstances, had Dunpar attempted to appeal same, under the pre-Bill 51 *Planning Act*, a ground to dismiss such appeal without conducting a full hearing existed under subsections 17(45)(b) and 34(25)(a.1). Under subsections 17(24) & (36) and 34(19) of the current *Planning Act*, Dunpar would not even have any appeal rights to begin with.

24. Peter Smith's suggested rationale for Dunpar's inaction ought not to be given any weight by the Board. Dunpar could easily have objected and appealed on a site specific basis, thus not "holding up" the balance of the Avenue study planning documents from taking effect.

25. Section 1.1 of the applicable *Planning Act* provided:

The purposes of this Act are

(a) to promote sustainable economic development in a healthy natural environment within the policy and by the means provided under this Act;

(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 provide for planning processes that are fair by making them open, accessible, timely and efficient;

(e) to encourage co-operation and co-ordination among various interests;

(f) to recognize the decision-making authority and accountability of municipal councils in planning.

26. This Board ought to give weight to purposes (d) and (f) above and not countenance Dunpar's inaction during the Avenue study and its failure to object to and appeal the by-law provisions with which it now disagrees.

27. Should Dunpar succeed with its present appeal of its earlier filed rezoning application [to the pre-Avenue zoning by-law provisions] it will be doing indirectly that which it could not have done directly. The Board should find that Dunpar had every opportunity to participate in the Avenue study process and that it ought to have participated in it.

The Determinative Official Plan

28. Since July 6, 2006, the Dunpar lands have been subject to and designated by the new Toronto OP. On that date the former Etobicoke OP was repealed. Absent anything further, the determinative OP is the Toronto OP.

29. As the Dunpar application was filed and revised prior to July 6, 2006, Dunpar potentially could seek to invoke the "Clergy" principle. Dunpar would not advise at the hearing's commencement which OP it would be requesting its zoning appeal to be assessed against when determining the matter of conformity. The law is clear that the zoning application must be tested against one OP or the other. In no case can an application be free from the test of conformity with an OP.

30. Peter Smith in cross examination assessed the Toronto OP as being “admissible, relevant, but not determinative”. Robert Glover offered no opinion respecting this issue.

31. The overall impression left by Peter Smith is that the former Etobicoke OP is the determinative one as it was the OP in place when the application was filed.

32. The appeals on their face fail to comply with the Etobicoke OP’s maximum six storey height policy for the Commercial-Residential Strip designation [Sorensen above]. Mr. Glover stated, when reviewing policy 4.4.4 that “the maximum height would have to be changed” in order to permit the proposal. Mr. Smith’s witness statement confirmed this [Exhibit No. 10, Attachment “B”, p. 5].

33. Should the Board reject [as the City and Kingsway submit it ought to] Dunpar’s suggested “rounding out” submissions respecting that designation’s boundary to the south limit of 567 Prince Edward Drive, the appeals also fail to comply with this OP’s mandatory 45 degree angular plane.

34. The appeals also fail to comply with the Toronto OP [Sorensen above]; especially due to 567 & 569 Prince Edward Drive being designated as “Neighbourhood Area”.

35. Dunpar filed a subsection 22(7) OPA appeal in January, 2007 with this Board and attached a proposed OPA seeking to redesignate 567 and 569 Prince Edward Drive to “Mixed Use” from “Neighbourhood Area” under the Toronto OP.

36. Dunpar filed Peter Smith’s witness statement in October, 2007 attaching the identical proposed OPA with opinions that approval of such OPA was appropriate.

37. Dunpar’s position is that such an OPA is not necessary, relying solely on the application of interpretation policy 5.6.5.

38. The clear words of 5.6.5 support the “decision tree” evidence of Sorensen above and Oikawa [Exhibit No. 39, p. 11] and that the “Mixed Use” boundary has been precisely and deliberately delimited by Special Policy Area No. 277. Dunpar’s request to “round out” the Mixed Use designation to include these two residential lots goes against the clear and unambiguous words and meaning of policy 5.6.5.

The "Clergy" Principle

39. Dunpar's written closing argument addresses the "Clergy" principle and determinative OP issue at its pages 10-11.

40. It is respectfully submitted that the "Clergy" decision and *Planning Act* provisions do not stand for the proposition espoused by Dunpar's counsel nor by its planning consultant. This is a legal matter and no weight should be given to Peter Smith's summary of "the appropriate test in terms of compliance" as suggested therein.

41. A statutorily-mandated first principle of planning is that a zoning by-law must conform with a municipality's OP.

Subsection 24(1) of the *Planning Act*

42. Only one OP can be considered to be determinative when considering whether this requirement has been met. As the Board noted in the Clergy case:

> "The Board, in determining the policy framework under which an application should be examined, has consistently stated that an application **must be tested against the policy documents in place at the date of the application**. It has done so in order to lend some certainty to the land use planning process, and to ensure that fairness to all parties prevail." [emphasis added]

Clergy Properties Ltd. v. Mississauga (City)
(1996), 34 O.M.B.R. 277 (OMB) at 280

43. The "Clergy" principle protects a landowner/applicant from the adverse effects of a new policy framework being made applicable to a pre-existing application.

44. The "Clergy" principle achieves this by recognizing that the landowner/applicant has the opportunity to elect to have his or her application considered under the existing policies that applied at the time of application.

45. Such election is solely that of the affected landowner/applicant. Such a decision cannot normally be imposed upon the landowner/applicant by the municipality or the Board. [see *James Dick Construction Ltd. V. Caledon (Town)* (2003), 47 O.M.B.R. 87 (OMB) at pp. 97-98 for such a rare instance where the "Clergy" principle was held not to apply].

46. Once a landowner/applicant elects to have its zoning application tested for conformity under the OP polices in place at the time of the application, any newer policies have been held to be otherwise "admissible, relevant, but not determinative" in reaching the overall planning decision.

Dumart v. Woolwich (Township)

(1997), 36 O.M.B.R. 165 (OMB) at 168

47. Dunpar's "Clergy" analysis ignores the fundamental significance of Subsection 24(1) of the *Planning Act* and that there always must be one OP that is considered determinative in assessing the conformity issue.

48. In essence, Dunpar has "hedged its bets" in its closing argument by asserting that "we have regard to both" sets of OP policies, refusing to elect as to which OP its zoning by-law application is to be assessed against when determining OP conformity. In effect, this results in Dunpar not being required to conform with either OP.

49. Peter Smith saying that the former Etobicoke OP should be given "more weight" than the current Toronto OP misses the point entirely, as does Mr. Brown's reference to Subsection 24(2) of the *Planning Act*.

50. Unless the landowner/applicant elects to have its zoning by-law application assessed under the former policy regime, such application will be assessed under the current OP policy regime.

51. In the absence of such an election, city staff properly assessed and reported on the Dunpar application in their initial staff report dated August 28, 2006 as against the then in force OP policies of the new Toronto OP.

Exhibit No. 14, Tab 18

52. Dunpar argues that:

> "In Mr. Smith's opinion, more weight is to be given to the old policies, as opposed to the new, however, he confirmed what we know to be fact, which is that while the old policies required an amendment, they are no longer in effect, they have been repealed, and as such, there is no amendment required to a repealed official plan."

53. The “Clergy” principle tests an application against the OP policies that existed on the date of the application, even if those policies are no longer in force and effect, having been replaced with a new set of policies.

54. Dunpar’s argument is circular and groundless. Effectively Dunpar acknowledges that its zoning by-law needed an OPA at the time of application [i.e. did not conform to the Etobicoke OP]. However, no amendment is now required because such OP has been repealed, and that because the OP is repealed, it causes the essential non-conformity to disappear with it! This entirely misconstrues “Clergy” and how it has been applied by the Board..

55. On the basis of all the surrounding circumstances, it is respectfully submitted that Dunpar sought to avoid the new Toronto OP and the Dundas Street West Avenue Study and Special Area Policy No. 277 being determinative of its application. Peter Smith unequivocally stated that the new Toronto OP was not determinative, leaving the Board to thus conclude that the former Etobicoke OP as being the determinative one.

56. The Dunpar applications clearly failed to conform to the “absolute” maximum height limit of 6 storeys in that OP and also failed to conform in where it proposed to locate the 45 degree angular plane from the boundary of the Commercial Residential Strip where it abutted the Low Density designated lots on Prince Edward Drive. [see paras. 5, 8-11 & 32-33 *supra*].

57. In the alternative, Dunpar argues that the new Toronto OP is the determinative one. If so, its zoning by-law application fails to conform with its policies [see paras. 6, 8-11 & 34-38 *supra*].

58. Dunpar recites the oft-quoted excerpt from the *Bele Himmell* court decision. This statement makes two propositions:

(i) it is the function of the Board in the course of considering whether to approve a by-law to make sure it conforms with the Official Plan; and

(ii) in so doing, the Board should give to the Official Plan a broad liberal interpretation with a view to furthering its policy objectives [recognizing that in such a document there will almost inevitably be inconsistencies and uncertainties when considered in light of the specific proposal].

59. No witness suggested that either of the Etobicoke OP’s absolute maximum 6 storey height or 45 degree angular plane requirements were either inconsistent or uncertain with other OP policies. No one suggested that 567 & 569 Prince

Edward Drive lots were required to be incorporated into the Commercial Residential Strip in order "to achieve satisfactory development standards".

60. Similarly, the new Toronto OP's designation of 567 & 569 Prince Edward Drive as "Neighbourhood Area" and excluding such lots from the area included in Special Policy Area No. 277 were neither inconsistent nor uncertain with other OP policies.

61. As the Board has noted on a similar occasion:

> "There can be no doubt that the wording of the Official Plan in combination with a strict construction of the by-law would place this application beyond the pale. The history of the policies associated with this area reinforce the conclusion of the Board that the Official Plan language is a firm and unambiguous prohibition. Section 5.6 says that in the Special Commerce Area the maximum non-residential floor area can be no more than 2.0 times the lot coverage. This is an unusually detailed prescription that admits of little interpretation or flexibility. It clearly intends to provide certainty and firmness to the consideration of applications of this kind. Despite the trusted qualification offered by the *Bele Himmell Investments Ltd.* case (*Bele Himmell Investments Ltd. v. Mississauga (City)* (1982), 13 O.M.B.R. 17 (Ont. Div. Ct.)), there is no liberal interpretation or opportunity for flexibility to Council's clear policy intention. It would be an exceptional and I believe an incorrect leap of logic to say that Council did not mean what it clearly said. While the Board has the discretion to consider the wording in the way that most suits the general objectives of the Plan, I cannot ignore the clarity of the policy and in this case cannot apply it any other way.
>
> *Halimar Investments Inc. v. Toronto (City)*
>
> (1998), 37 O.M.B.R. 443 (OMB) at 454

62. As noted in para. 29 above, Dunpar would not advise at the hearing's commencement which OP it would be requesting its zoning appeal to be assessed against when determining the matter of conformity.

63. The Board has held that parties are entitled to understand the "rules of the game" from the outset and that procedural fairness and natural justice require that a party know the case it must answer. It is respectfully submitted that a similar principle holds true respecting the Board's hearing process itself.

Sun Life Assurance Co. Ltd. v. Burlington (City)

OMB Case PL060707, Decision issued November 29, 2007

Dundas Street West Avenue Study

64. Dunpar's criticism of this Avenue Study boils down to two propositions; namely that the study process and report:

(i) did not examine appropriate maximum heights before recommending a maximum 6 storeys or 20m; and

(ii) did not analyse appropriate boundaries for intensification.

65. It is submitted that Ms. Johncox's evidence disclosed in her in-chief testimony, and Dunpar was aware, that higher heights under certain conditions were raised and discussed during the public meeting process [later shown in Exhibit No. 38, p. 7]. That such was not expressly included in the final report does not derogate from the fact that it happened nor make it "mysteriously missing" and "odd" as Dunpar suggests. What is odd is Dunpar counsel's reference to and reliance on an artistic rendering [Exhibit No. 15, p. 60] showing a potential Avenue east gateway landscape feature to suggest that Dunpar's site was to have a height higher than 6 stories!

66. Mr. Oikawa testified that the Avenue By-law 717-2006 was in the nature of a pre-zoning, setting height ceilings not floors, and that the heights and boundaries were part of its core components.

67. Respecting the issue of boundaries, the evidence is clear that 571 Prince Edward Drive [together with a few other diverse lots] was consciously and intentionally placed within Special Policy Area No. 277 due to its pre-existing split commercial/residential zoning bisecting that lot. By making such a decision, the Avenue Study specifically and deliberatively went no further in also including the southerly two lots within its delimitation.

68. Kingsway and the members of the public who testified on public night participated in and are committed to the resultant zoning by-law and urban design guidelines arising from the Avenue Study.

69. In a similar situation the Board noted:

> "The Official Plan and by-law for this neighbourhood are the result of a lengthy process of planning and policy-making. Council, land owners and the citizens of this area have attempted to arrive at an acceptable level of regulation and permission that would permit appropriate redevelopment and a reasonable increase in the density and activity of use. To this end studies have been conducted and issues have been won and lost, leading

> to what the residents of the area consider to be a compromise between development and protection. This compromise, while seeming inflexible on some occasions, serves the interests of the entire community-including the interests represented in this hearing-by affording an ongoing policy balance that both allows and prohibits development in the greater interest.
>
> . . .
>
> Policies have been properly enacted based on a lengthy period of planning and neighbourhood activism and these policies remain reasonable and appropriate in the circumstances. They protect a public interest with out prejudice to longstanding private interests and their alteration on a site specific basis with out a more substantial justification is not warranted.
>
> *Halimar Investments Inc. v. Toronto (City)*
> (1998), 37 O.M.B.R. 443 (OMB) at 455-456

70. Respectfully, the Board is requested to adopt and apply the reasoning in the *Halimar* decision in this instance and conclude that Dunpar's zoning appeal is not justified nor warranted under all of these circumstances.

"No Impact" Development Proposal

71. Dunpar argues that as its development proposal creates no adverse impacts on abutting properties, it ought to find favour with the Board.

72. It characterizes this as being the "normal issue [impact] you hear raised at these types of hearings" and suggests that the city and Kingsway have focussed only on "process and technicalities" rather than what constitutes "good planning".

73. Dunpar's argument should not be accepted by the Board as it is both factually and legally incorrect.

74. By-law conformity with OP policies is a fundamental, first-principle tenet of land use planning in this Province. A municipality and this Board cannot approve of a zoning by-law which fails to conform to an OP. OP conformity constitutes a required measure of what is "good planning".

75. If a by-law does not get past this first statutory hurdle, it cannot be saved upon a finding that such resultant development will otherwise have no adverse impact on the surrounding community.

76. To accede to Dunpar's argument will eviscerate the *Planning Act* and its policy-lead planning system and substitute an "impact" test as the sole determinative criteria upon which to base a decision as to what constitutes "good planning".

Brownstones "Precedent"

77. Dunpar refers to the Brownstone townhouses it developed to the east and points to alleged inconsistencies of treatment with its current development proposal.

78. That example is both readily explained and distinguished, but also demonstrates why Kingsway is concerned about the precedent value of a decision in this present case and how it will be used respecting Dunpar's other development sites within the Study Area.

79. The Brownstones were approved under the former Etobicoke OP provisions which allowed for townhouses as a permitted house form in the abutting low density residential areas as well as in the commercial residential strip designation.

80. Permitting the rear potions of certain extra-deep residential lots fronting on Government Road to be severed and added to the four assembled commercial properties [no sketched provided of the extent of the transfer] without an OPA did not result in any net loss of residential lots or houses in the community.

81. Contrast that to the present situation with a recently completed Avenue Study delimiting the intensification boundary. Dunpar's proposal results in a loss of two residential lots; an incursion of a mixed use designation down Prince Edward Drive; and the introduction of a mid-rise apartment building in an area characterized by 2 storey detached dwellings.

82. As the facts surrounding that Brownstone development are sketchy at best and no witnesses had any direct involvement respecting that application or the city analysis of it, little weight ought to be accorded to it in determining this appeal.

83. Yet in raising it, Dunpar confirms the fears of Kingsway that a decision favourable to it in its present appeal will establish a new benchmark for heights and neighbourhood incursion that will be applied to its lands located at the south west corner of Dundas Street and Prince Edward Drive and the lots it has acquired down that latter street.

Miscellaneous

84. Kingsway respectfully notes that it rejects the recollection, characterization and out-of-context use of the evidence offered by Dunpar in its closing argument. Not mentioning each instance of disagreement is not to be considered acceptance by Kingsway of the points not directly rebutted.

85. Dunpar's suggestions that Mr. Oikawa "invented distinctions" and that "the approach taken by many of the witnesses opposite, which lead to absurd and inconsistent conclusions" are unfounded and highly derogatory.

86. Dundas Street now apparently "has excellent public transit" according to Dunpar's closing argument, a suggestion expressed by no one at the hearing.

87. The Board is reminded that the Essence did not extend into the neighbourhood but remained within the Commercial Residential Strip and oriented toward Dundas Street West.

Costs Requests

88. As the Board has been advised and acknowledged, Kingsway respectfully reserves its right to make submissions respecting its request for costs for both its jurisdictional motion and this hearing event at the appropriate time and in any manner as may be directed by the Board.

All of which is respectfully submitted.

December 14, 2007

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