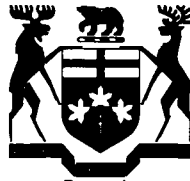


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PL070056

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

Dunpar Developments 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 respecting 4187 Dundas Street West and 567, 569 and 571 Prince Edward Drive
O.M.B. File No. M070027

APPEARANCES:

Parties

Counsel

Dunpar Developments Inc.

A. Brown

City of Toronto

S. Bradley

Kingsway Residents Against Poor Planning

L. Longo

DECISION OF THE BOARD DELIVERED BY SUSAN B. CAMPBELL

Background

In this matter, the Board originally had before it the appeals of Dunpar Developments Inc. ("Dunpar") with respect to an Official Plan Amendment and a Zoning By-law Amendment and a referral of a site plan in respect of a property at 4187 Dundas St. W. and 567, 569 and 571 Prince Edward Dr., in the City of Toronto (the "City"). The applications were filed on February 1, 2006.

A party to this hearing, the Kingsway Residents Against Poor Planning (the "Kingsway Group") brought a Motion seeking an Order of the Board determining that the Board was without jurisdiction to hear the appeal with respect to the Official Plan

Amendment. Another panel of this Board heard the Motion and determined that the Board did not have jurisdiction to hear the Official Plan Amendment appeal with respect to either the Etobicoke Official Plan (the "Etobicoke OP") or the Toronto Official Plan (the "Toronto OP"). Therefore, only the Zoning By-law Amendment and the site plan are now before the Board.

Proposal

The subject property is comprised of four lots at the intersection of Dundas St. W. and Prince Edward Dr. The property at 4187 Dundas St. W. is located at the corner of the intersection and has an 11.65m wide "tail" extending behind the three lots on Prince Edward Dr. The properties at 567, 569 and 571 Prince Edward Dr. were previously occupied by single-family houses, which Dunpar has demolished. The frontage of the property is 51.9m on Dundas St. W., the depth is 72.8m on Prince Edward Dr.

Dunpar proposes to develop the property with a residential building of seven storeys, containing 83 units. A mechanical penthouse and some indoor amenity space are located on the roof of the building and the City and the Kingsway Group take the position that this constitutes an eighth floor. The proposed building is L-shaped with the seven or eight-storey portion fronting on Dundas St. W. The building is to step down to two storeys on the lot at 567 Prince Edward Dr.

The Neighbourhood

There is a mix of land uses surrounding the subject property. The north and south sides of Dundas St. W. in the vicinity of the subject property is currently predominately occupied by commercial buildings. However, as Robert Glover who was qualified by the Board to provide expert urban design evidence on behalf of Dunpar said in his witness statement, Exhibit # 11, "the urban design character of Dundas St. W. between the Humber River and Royal York Road is currently in transition between two different personalities". It is apparent from Mr. Glover's evidence and the evidence of other witnesses, that the area was developed as an automobile oriented, commercial and industrial strip on a busy, wide, arterial road. However, Mr. Glover described its "emerging building pattern and character" as "that of development containing street-related mixed-use, residential and Main Street character". In the Toronto OP this portion of Dundas St. W. is designated as an "Avenue" which Mr. Glover indicated,

“anticipates a greater scale and intensity of development than currently characterizes a majority of the street”.

Immediately to the east of the subject property is an example of the evolving character of Dundas St. W., a development of recently constructed three-storey condominium townhouses. Further east at the next intersection, is a recently completed six-storey, 130 unit residential condominium building. To the west of the site, across Prince Edward Dr., is a three storey commercial building, abutting houses on Prince Edward Dr. To the north, on the other side of Dundas St. W., are two to three-storey commercial buildings and a recently constructed six-storey residential building.

Immediately to the south of the site is the well-established Kingsway neighbourhood. The members of the Kingsway Group, who object to this proposal, live in this neighbourhood. The Board heard evidence that another Kingsway neighbourhood association does not object to the proposal. As Warren Sorenson, who was qualified by the Board to provide expert land use planning evidence on behalf of the Kingsway Group, noted in his witness statement, Exhibit # 47: “the homes are detached dwellings of varying size, some single-storey but most being two or two-and-a-half storeys. By my observation, this neighbourhood is a highly desirable area for low-density housing, and shows evidence of significant re-investment occurring through expansions, upgrades and replacement home construction”.

Evidence of Dunpar

Peter Smith was qualified by the Board to provide expert land use planning evidence on behalf of Dunpar. As noted above, Robert Glover provided expert urban design evidence on behalf of Dunpar.

Filed as Exhibit # 10 was the Witness Statement of Mr. Smith, including an extensive Planning Rationale Report (the “Report”). At the time that the Witness Statement and the Report were prepared, the official plan amendment was before the Board. However, the Board notes section 2.2 of the Report, Required Approvals. Mr. Smith states:

Pursuant to the Etobicoke Official Plan in force at the time of the application, an Official Plan Amendment was required in order to increase

the permitted height from six storeys to seven storeys. However, in our opinion, there was sufficient flexibility provided by the Plan's policies to allow for the adjustment to the boundary between the Low Density residential and Commercial-Residential Strip designations without the need for an official plan amendment.

Pursuant to the new Toronto Official Plan, an official plan amendment is being sought out of an abundance of caution to redesignate the southerly portion of the site from Neighbourhoods to Mixed Use Areas and to adjust the boundaries of Area-Specific Policy 277. However, it is our opinion that the requested adjustment to the boundaries of the Mixed Use Areas and Area-Specific Policy 277 would fall within the ambit of the Plan's interpretation policies.

Mr. Smith reviewed the relevant policy framework with the Board. The Provincial Policy Statement (2005) (the "PPS") is applicable to this application. Mr. Smith noted that one of the three key policy directions of the PPS "is to build strong communities by promoting efficient land use and development patterns". Of particular relevance, in Mr. Smith's opinion, is section 1.1.3, Settlement Areas. Policy 1.1.3.2 mandates land use patterns in areas like the City, based on densities and a mix of land uses which "efficiently use land and resources" and which "efficiently use the infrastructure and public service facilities which are planned or available..." Policy 1.1.3.3 provides "planning authorities shall identify and promote opportunities for intensification and redevelopment where this can be accommodated taking into account existing building stock or areas...and the availability of suitable existing or planned infrastructure..." Further, Policies 1.1.3.5 and 1.1.3.6 require planning authorities to establish and implement minimum targets for intensification and redevelopment in built-up urban areas.

Policy 1.4.3 provides that planning authorities shall provide for the appropriate range of housing types and densities to meet current and projected needs, by, *inter alia*, "permitting and facilitating...all forms of residential intensification and redevelopment in accordance with Policy 1.1.3.3".

Finally, Policy 1.6.5.4, in dealing with transportation systems, promotes a land use pattern, density and mix of uses "that minimize the length and number of vehicle trips and supports the development of viable choices and plans for public transit..."

It was Mr. Smith's opinion that the proposed development is consistent with the policy direction found in the PPS. The proposed building represents appropriate residential intensification on a site well-served by transit and other municipal infrastructure. In Part 3.3 of his Report, Mr. Smith described the site as "well-located in relation to the City's road network". Dundas St. W. is classified as a "Major Arterial", while Prince Edward Dr. is classified as a "Collector". In close proximity to the site is Royal York Road, classified as a "Minor Arterial".

In Mr. Smith's opinion, the site is "well-served by public transit. The 30 Lambton bus runs along Dundas Street West, serving the High Park subway station to the east and the Kipling subway station to the west. It provides seven day/week service, with 20 minute headways during rush hours and 30 minute service at off-peak times...The site is also located close to the Bloor and Kipling GO Stations".

In Mr. Smith's opinion, residential intensification on the site is "consistent with the housing policies of the Provincial Policy Statement which encourage a variety of housing types and densities, in order to offer current and future residents a range of housing choices".

Mr. Smith briefly reviewed the Growth Plan for the Greater Golden Horseshoe, 2006 (the "Growth Plan"), acknowledging that it came into effect after the applications were filed. Therefore, in his opinion, the applications are to be evaluated as if the Growth Plan were not in place. The Board finds that this document is in no way determinative of these appeals. Its only relevance is the fact that its language reinforces the language of the in effect PPS when it speaks to intensification. The Growth Plan notes that, "better use of land and infrastructure can be made by directing growth to existing urban areas. This Plan envisions increasing intensification of the existing built-up areas, with a focus on urban growth centres and intensification corridors..."

Mr. Smith reviewed the provisions of the Etobicoke OP which was in effect at the time the applications were made, and the Toronto OP which is now in effect. In considering which official plan is determinative of these applications, the Board must have regard to a number of cases cited by Counsel. Of particular relevance is *Clergy Properties Ltd. v. Mississauga (City)* (1996), 34 O.M.B.R. 277 in which the "Clergy

Principle” was enunciated. The Board in that case said “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”.

As recently as November 2007, this panel of the Board thoroughly reviewed the “Clergy Principle” and Board decisions which seem to stand for the proposition that the choice of the policy regime to be applied to an application is merely a matter of Board procedure, in *SunLife Assurance Company of Canada v. City of Burlington*, OMB Case PL060707, November 29, 2007. This panel of the Board said in that case, and reiterates here: “both private parties and representatives of the public interest are entitled to understand the ‘rules of the game’ from the outset”. Neither an applicant nor a planning authority has the ability independently to “choose” the policy regime against which an application will be tested. An applicant or a planning authority may choose to “hedge its bets” and address both policy documents in effect at the time of the application, and policy documents which have subsequently come into effect. Dunpar did so in this case; its witnesses and Counsel dealt with both policy regimes. The City focused almost exclusively on a policy regime, which came into effect after the date of the filing of the applications.

Neither “choice” by either the applicant or the municipality is determinative for the Board. If all parties agree that a policy regime which came into effect after the date of an application should be applied in considering the application, the Board will give considerable deference to that agreement. However, generally following the principles of natural justice, the Board will evaluate an application against the policy regime in effect at the time the application was made.

Therefore, the Board finds that only one official plan may be determinative of an application. It is the official plan, which was in effect at the date of the application. In this case the application for a zoning by-law amendment and the site plan referral will be considered in light of the policies found in the Etobicoke OP.

Mr. Smith reviewed the relevant portions of the Etobicoke OP with the Board. Map 4, Land Use, designates the portion of the site fronting on Dundas St. W. as Commercial-Residential Strip. The lands to the rear are designated Low Density Residential. Section 4.4 of the OP deals with the Commercial-Residential Strip designation. Such a designation is “intended to recognize the traditional commercial and mixed use areas that have developed in linear form along arterial roads”. The designation permits a full range of commercial uses. The policy also provides “these areas also contain a wide mix of non-commercial uses such as residential, institutional and community facilities reflecting their original role as the main concentration of activities for the residential development around them. These characteristics are encouraged to continue and intensify in the future”. (emphasis added)

Section 4.4.4 provides that a maximum height of six storeys is permitted, which shall be stepped down to a lower height or separated by distance or buffers where necessary to respect the proximity of nearby low-density residences.

Section 4.2 deals with the Residential designations. The Low Density Residential designation is “intended to be areas of ground oriented housing together with local institutions, amenities and minor commercial uses which serve the local population”.

Mr. Smith drew the Board’s attention to a number of sections of the Etobicoke OP, which allow for the minor adjustment of boundaries among land use designations without the need for an official plan amendment. Section 12.1.6 provides “the boundaries between Land Use designations on Map 4 are approximate except where they coincide with roads, railway lines or other clearly defined physical features. Where the general intent of this Plan is maintained, minor adjustments to boundaries will not require an amendment”. (emphasis added)

Section 4.4.7 specifically allows for the incorporation of adjacent residential properties into the Commercial-Residential Strip by way of rezoning without an amendment to the OP:

In Commercial-Residential Strip designations, where existing commercial development directly abuts residential uses to the rear without the benefit of a service lane, consolidation may be required in order to achieve satisfactory development standards. In such cases amendments to the Zoning Code may be

considered, on a comprehensive basis, without amendment to this Plan in order to:

incorporate the residential properties into an integrated redevelopment to achieve better access, site design and a larger redevelopment parcel.

Such zoning amendments may be made subject to the criteria in section 4.4.6 provided that:

adequate landscaping and screening is provided to buffer the parking, loading and other such areas from the residential uses on the opposite side of the street; and

the height and form of any new development does not create undue adverse impacts in terms of over shadowing or loss of amenity.

Section 4.4.6 refers to criteria set out in section 4.3.16, the criteria for permitting residential intensification. The criteria are as follows:

- a) the proximity of the site to Medium or High Density Residential Designations;
- b) the adequacy of local social and educational services;
- c) the level of accessibility and the proximity of the site to collector roads, arterial roads, transit and expressways, and the capacity of those facilities;
- d) the suitability of the site in terms of size and shape to accommodate the proposed additional uses and density including on-site parking, access and traffic circulation for all uses, and landscaping and recreational facilities for the residents;
- e) the desire to provide a range of dwelling types and building heights on sites of sufficient size as indicated in section 2.2.6;
- f) the effect of increased traffic, so that no undue adverse impacts are created for local residential uses;
- g) the effect of the height and form of development so that no undue adverse impacts in terms of overshadowing or loss of amenity are created for existing residential buildings or neighbouring residential uses;
- h) the relationship of the site to nearby lower density residential uses, if any, in view of the desire to provide a gradual transition in height and density wherever possible, or other buffering measures;

- i) the degree to which the site is proximate or exposed to significant open space amenities such as valleylands or the waterfront;
- j) the ability to meet the housing targets in section 2.2;
- k) the desire to stay within the population ranges outlined in sections 2.2.1 and 2.2.2;
- l) the availability of alternative undeveloped or underdeveloped retail lands to accommodate the proposed use; and
- m) the potential for adverse impact on the planned function of other Retail or Commercial-Retail designations.

Finally, Mr. Smith considered the intensification policies of the Etobicoke OP. Section 2.2.3 provides “the City shall encourage the integration of an initial level of intensification of at least 14,000 additional units during the planning process ending in 2006”. Section 2.2.8 provides “housing targets will be met primarily through housing intensification in residential, retail and institutional designations, but also may be met through redesignation and redevelopment of other land use designations”.

It was Mr. Smith’s opinion that it would be appropriate to utilize sections 12.1.6. and 4.4.7 of the Etobicoke OP to incorporate the Low Density Residential area of the subject property into the Commercial-Residential Strip. Mr. Smith had regard to the criteria set out in section 4.4.6 and 4.3.16 of the OP in coming to this conclusion. In section 5.2 and Appendix 1 of his Planning Report, Mr. Smith considers what he terms “the rounding out of the intensification area boundary along Dundas Street West to include the two additional residential properties at 567 and 569 Prince Edward Drive”. The property at 571 Prince Edward Dr. was made part of the “Avenue” for the purposes of the Toronto OP by the Avenues By-law to be discussed below. In Mr. Smith’s opinion “the proposed rounding out of the boundaries would result in a more regular and logical southern boundary for the intensification area, would allow for better site development, and would be consistent with the policies and interpretation provisions of both the Etobicoke Official Plan and the New Official Plan”. Mr. Smith notes that the current boundary is “irregular...it ‘jogs’ north along the east side of Prince Edward Drive to include 564 Prince Edward Drive. With the inclusion of 567 and 569 Prince Edward Drive, the south boundary of the intensification area on the subject property would be

generally in line with, but slightly to the north of, the south limit of the Brownstone Lane townhouse development”.

Mr. Smith went on to note “the configuration of the individual property boundaries in the specific circumstances (i.e. the ‘L’ shape of the 4187 Dundas West Street property wrapping around the three properties fronting on Prince Edward Drive) means that the consolidation of the four properties would create a larger and more regular development site which can better accommodate site access, site design and servicing”. Therefore, in his opinion, the proposed expansion of the boundary of the Commercial-Residential Strip satisfies the conditions set out in section 4.4.7, specifically:

- the proposed development plan provides adequate landscaping and screening to buffer parking, loading, and service areas from adjacent low density residential uses; and
- the resulting height and built form will not create any unacceptable adverse impacts.

It was the evidence of Mr. Smith, reinforced by the urban design evidence of Mr. Glover, that all parking would be located below grade; the proposed loading area would be internal to the site, well-separated from the low density area, with a 3.0m landscaping buffer along the south property limit. The height and built form will, in his opinion, maintain a 45-degree angular plane measured from the low-density residential area, such that no adverse impacts in terms of privacy, shadowing or overlook are anticipated. In this context, Mr. Smith’s Planning Report contains a shadow study that “demonstrates that there would be no shadowing impacts on the low-density residential area to the south at any time of day or year”.

Further, in Mr. Smith’s opinion, the proposal to expand the boundaries of the Commercial-Residential Strip satisfies the criteria set out in sections 4.4.6 and 4.4.16 of the Etobicoke OP. Appendix 1 of his Report addresses the criteria in some detail. The Board, in considering whether the proposal represents good planning and whether it can proceed without an amendment to the Etobicoke OP, must have particular regard to whether these criteria are met.

In discussing the use of section 4.4.7 to consolidate residential properties into the Commercial-Residential Strip designation, Mr. Smith drew the Board's attention to Exhibit # 18, which contains the staff report on the development application which led to the construction of the Brownstone townhouses immediately adjacent to the subject property. In that case, City staff was satisfied that, although the proposal did not meet all the criteria of section 4.4.6, it did "meet the overall intent of the policies for residential development within a Commercial-Residential Strip". The boundary adjustment which was permitted in that case resulted in the extension of the Commercial-Residential Strip further south into the single-family residential neighbourhood than would be the situation in the case at hand.

Mr. Smith testified that his understanding of how section 4.4.7 is to operate is informed by how City staff dealt with the Brownstone property.

Mr. Smith reviewed the current zoning applicable to the subject property. Pursuant to By-law 717-2006 (Exhibit # 14, TAB 10) (the "ZBL"), the portion of the site comprised of 4187 Dundas St. W. and 571 Prince Edward Dr. is now zoned CG-AV-H, while 567 and 569 Prince Edward Drive are zoned R2.

The CG-AV (General Commercial-Avenues) zoning permits a range of residential uses, including apartment houses, as well as all business, institutional and public uses permitted in a CG zone. The maximum permitted floor space index ("FSI") is 2.5, which may be increased to 3.0 provided the owner enters into a satisfactory section 37 agreement with the City, while Dunpar seeks an FSI of 3.3. The maximum permitted building height for the first 60m in depth from Dundas St. W. is five storeys and 14m, which may be increased to six storeys and 18.5m, provided the owner enters into a satisfactory s. 37 agreement, while Dunpar seeks seven storeys and 24.5m. A mechanical penthouse of 25m² is permitted while Dunpar seeks a roof top structure, including the mechanical penthouse, of 225m².

Mr. Smith addressed issues of height, massing and density in section 5.3 of his Planning Report. Further evidence on these issues was adduced by Mr. Glover from an urban design perspective. In Mr. Smith's opinion the design of the proposed building is generally consistent with the ZBL and the Dundas Street West Avenue Study and its design guidelines. In his opinion the only significant deviation from the ZBL is the

overall height of the proposed building. The Avenues Study, which was the foundation for the ZBL envisioned six storeys and 18.5m (with the section 37 “bonus”), while the proposal is for seven storeys and 24.15m. Mr. Smith notes that neither the Avenues Study, nor the supporting staff report included any analysis of the basis for the recommended six-storey height limit. Mr. Smith considered this to be “unusual”.

In Mr. Smith’s opinion the greater height proposed can be supported on the subject site as it is at the important intersection of Dundas St. W. and Prince Edward Dr. Dundas St. W. is an arterial road and Prince Edward Dr. is a designated collector. Mr. Smith is of the opinion that “as a planning and urban design principle, it is appropriate to allow for higher landmark buildings at these strategic locations so as to differentiate such sites from an otherwise uniform and potentially monotonous height regime. Such an approach has been adopted by the City in other Avenue Studies, e.g. The Queensway and Wilson Avenue, allowing heights of up to eight storeys on corner sites within the six storey height regime”.

Mr. Smith also opined that a building height of up to 27m could be supported at this location based on the width of Dundas St. W. The proposed building would be within the 1:1 height to right-of-way width ratio, which has generally been accepted in the City to establish a height for mid-rise buildings.

Having regard to the shadow impact study, Mr. Smith was of the opinion that the proposed building, at the proposed height, would have no adverse impact on the low-density residential neighbourhood to the south at any time of the day or year.

Finally, in Mr. Smith’s opinion, “the increased height would better achieve the planning objectives for residential intensification on the site”.

Having reviewed the relevant policy documents and the issues list in this matter, Mr Smith concluded that the proposal represents good planning; it provides for appropriate residential intensification at an appropriate location with no unacceptable impacts on surrounding land uses.

Mr. Smith addressed Issue 7 from the issues list, the appropriateness of securing facilities, services or matters through the use of an agreement made pursuant to section 37 of the *Planning Act*. Section 11.8.1 of the Etobicoke OP provides that Council may

undertake bonus zoning. Section 11.8.6 provides “Secondary Plans and Area-Wide Land Use Studies shall provide a more explicit list of facilities, services and matters which will be considered...and the general ratio of bonus to public benefit to be applied...”

Mr. Smith testified that section 37 agreements are not mentioned either explicitly or implicitly in the Avenues Study. The ZBL contains in Clause “N” a requirement for a developer to enter into a section 37 agreement if it requires an increase in height or density. No rationale is provided in any document for how the section 37 benefits are to be quantified.

In this case, City staff first addressed the issue of section 37 benefits with respect to the proposed development in a staff report dated March 12, 2007 (Exhibit # 14, TAB 19). The report says, “the section 37 benefits have not yet been discussed with the Applicant. City staff have determined that the appropriate amount for these benefits to improve the Dundas Street West streetscape should equal \$15,000 per unit above the fifth floor”. Mr. Smith testified that there has been no attempt made by the City to provide any background analysis demonstrating how this figure was reached. Therefore in his opinion, it would not be appropriate for facilities, services and matters to be secured through the use of a section 37 agreement.

Mr. Glover reviewed the details of the subject property and its immediate neighbourhood, testifying that the area is in “a period of transition”. The area has “two different personalities”; the older personality reflects the wide arterial nature of Dundas St. W., while the new personality reflects the new “Avenues” designation (Toronto OP) with a more intense, mixed-use, “main street character”.

Mr. Glover reviewed with the Board Exhibit # 13, 66 photographs of the site and the immediate area. The photographs show the subject site and the Brownstone townhouses immediately adjacent, the low-rise retail-commercial uses along Dundas St. W., the new six-storey condominium buildings at 4196 and 4159 Dundas St. W., the residential neighbourhood immediately adjacent to the subject site, and the greater Kingsway neighbourhood further to the south.

Mr. Glover described the proposed building as a “terraced seven-storey residential condominium...The urban design for the site development consists of

creating a street-related, mid-rise building of seven-storeys along Dundas Street West, which turns the corner at Prince Edward Drive and steps down in height to the neighbourhood scale of two storeys". In his opinion, the appropriate transition to the neighbourhood is achieved as the "step back conforms to a 45-degree angular plane measured from the property directly to the south at 565 Prince Edward Drive". Exhibit # 12, page 10, West Elevation depicts the proposed building, showing the stepping down within the 45 degree angular plane.

The proposed building is setback 2.0m along the Dundas St. W. frontage and 3.0m along the Prince Edward Dr. frontage. Along both frontages, the building would be stepped back at the three-storey level by 1.5m "to create a lower street-related building scale along Dundas Street West and Prince Edward Drive before rising to seven storeys". The intersection of the streets is marked by the highest point of the building, at the mechanical penthouse (27.650m). The building height to street width on Dundas St. W. would be approximately 0.82:1. In Mr. Glover's opinion this is appropriate as it is within the generally accepted 1:1 height to street width ratio.

At the southerly end of the property the building would be set back 10.7m from the property line. In that setback would be a 3m landscaped area and a 7m driveway. Vehicle access would be from Prince Edward Dr., the loading area would be within the site, not visible from the street and screened from the adjacent house. Parking would be underground, accessed from a ramp on the east side of the building. Abutting the three-storey townhouse development, the building steps down to six storeys.

Mr Glover considered the provisions of the Etobicoke OP from an urban design perspective. In his opinion "with the exception of proposing a seven-storey building height instead of the six-storey height maximum contained in the policies, the proposed residential form of development is entirely consistent with the urban design parameters set out in the Plan". Further, in his opinion "the building form reinforces the Commercial-Residential Strip character of Dundas Street West by creating a continuous mid-rise building frontage along (the street) including a major lobby entrance at the corner of (the street) and Prince Edward Drive. The building frontage is scaled and articulated at the three-storey height, before stepping up to six and seven storeys".

As for the seven-storey height, it is Mr. Glover's opinion that a building of such a height is appropriate, "creating no unacceptable shadow or visual impacts on the amenity of Dundas Street West and has no impact on the character or amenity of the Kingsway Neighbourhood to the south of the site".

In Mr. Glover's opinion the policies of the Etobicoke OP that allow for the expansion of the Commercial-Residential Strip without an OPA are complied with, from an urban design perspective. The proposed design appropriately "buffers the residential uses" and "does not create any adverse impacts in terms of overshadowing or loss of amenity on the directly adjacent house forms".

Mr. Glover reviewed the Dundas Street West Avenues Study (the "Study") (Exhibit # 15), which formed the basis for the ZBL. He noted that the Study deals very briefly with the appropriate height for buildings on Dundas St. W. The Study recommends a maximum building height of 6 storeys, referring back to the Etobicoke OP, rather than forward to the policies of the Toronto OP. The Study notes that, "while there was considerable debate on appropriate heights and density for the area, consensus was found in the wish to improve the pedestrian environment". The study contains no explicit discussion about the impact of height on properties either on the Avenue or in adjacent low-rise residential neighbourhoods. In fact, the Board observes, the discussion of potential impact of new development focuses on traffic and schools. Traffic and schools were not issues in this hearing.

The Study also notes in "Constraints to Redevelopment" that "any new development on the south side of Dundas Street will have to step down and provide a buffer to the adjacent low-density residential area".

The Study's most detailed discussion of building height and potential impacts is found in Section 3.3, Guiding Principles:

3. Select an appropriate building scale and density for the street width and neighbourhood context.

The scale of buildings along Dundas Street should enhance and support a positive pedestrian environment and assist in transforming the current character of the strip. The proportion of building height to street width should be appropriate to enhance the look of the street and to maintain sunlight access. On the south side, buildings should

transition in scale to the adjoining low-rise residential neighbourhood. The effects of potential development on traffic and schools within adjacent neighbourhoods should be considered.

Mr. Glover had regard to the Dundas Street West Urban Design Guidelines which resulted from the Study. It was his evidence that the Guidelines set out three general categories of design guidelines: the location and organization of buildings relative to streets and open spaces; building massing; and landscape elements and pedestrian amenities. It was Mr. Glover's evidence, uncontradicted by any other witness with his expertise, that "the proposed site planning, building mass and design and improvements to the pedestrian realm are substantially in keeping with the recommendations of the guidelines".

Mr. Glover considered the issues on the issues list in reaching his conclusion that the urban design of the proposal is appropriate for the site's urban design context, and is consistent with the policies of the Etobicoke OP. In his opinion, the proposal "has minimal and acceptable impacts on adjacent areas and creates an appropriate relationship to its neighbours, and represents good urban design on the site".

Messrs. Smith and Glover were cross-examined at length by Counsel for the City and Counsel for the Kingsway Group. Much of the cross-examination focused on two areas: whether the proposal conforms with the Toronto OP and what the Board will term "process", or why Dunpar did not appeal the OPA and ZBL that arose out of the Avenues Study. As the Board noted above, the Etobicoke OP, not the Toronto OP is determinative of this application. While the City and the Kingsway Group may wish to test the application against the Toronto OP, evidence in this area is of limited relevance.

With respect to evidence about "process", it is important that the Board, in reaching a decision in this matter, focus on substance, not process. The Board accepts the evidence adduced that Dunpar did not appeal the Avenues By-law, although it could have. However, nothing in any statute or policy document requires that as a precondition to this application and appeal, Dunpar had to appeal either the Avenues By-law or the relevant OPA. A failure to appeal either of those instruments does not cause the Board to conclude that Dunpar was "waiting in the weeds" as was implied by Counsel for the Kingsway Group. Further, even if Dunpar were "waiting in the weeds",

whatever that may mean, the Board does not find that relevant in this hearing. If a party chooses to exercise some statutory rights and not others, the party cannot be penalized by this Board.

Counsel also cross-examined Mr. Smith on his opinion with respect to sections 12.1.6 and 4.4.7 of the Etobicoke OP. The Board finds that Mr. Smith was not shaken in his opinion by the cross-examination. He thoroughly justified his opinion that the Etobicoke OP allows for the incorporation of adjacent residential properties into the Commercial-Residential Strip designation via amendment only to the zoning by-law. He remained of the opinion that the criteria set out in the Etobicoke OP, which must be met for such incorporation, have been met in this case.

Under cross-examination, Mr. Glover remained of the opinion that, from an urban design perspective, the proposal is appropriate for the site and the context of the site.

Evidence of the City

Wendy Johncox was qualified by the Board to provide expert land use planning evidence on behalf of the City. She has extensive experience with the neighbourhood of the subject property as she co-ordinated the final staff report on the Avenues Study. In her Witness Statement, Exhibit # 26 and her Reply Witness Statements, Exhibits #27 and #28, she considered the proposal only against the policies of the Toronto OP. She did this despite acknowledging in her Witness Statement “the former City of Etobicoke Official Plan was in force at the time of the subject application”.

Ms Johncox reviewed the policies of the Toronto OP and concluded that the proposal does not meet the policies relevant to “Neighbourhoods” as the proposed building “does not reinforce the existing physical pattern of one and two-storey houses in the Neighbourhood with respect to height, massing and scale”. In her opinion:

The proposed intrusion into the Neighbourhoods Area threatens the fabric and character of the street. The inclusion of this part of the site within the Neighbourhood Area is of critical importance to preserving the low-rise residential character of this part of Prince Edward Drive. The significant intrusion of the apartment building, as proposed by the applicant, would seriously erode this character. This erosion would be exacerbated if mimicked on properties, including those of the applicant, on the west side of Prince Edward Drive.

In Ms Johncox's opinion the proposal does not provide an adequate transition to the neighbourhood and it does not meet the angular plane criteria if the angular plane is properly measured from the properties in the Neighbourhood Area.

Ms Johncox provided considerable evidence on the Avenues Study. The Study has a "vision" for the street: "a tree-lined street in keeping with the character of the Kingsway neighbourhood where people can walk safely, shop conveniently, and easily access the Humber River". Following on this vision, a number of guiding principles were set out which, as the Study says, "are designed to inform the recommendations, urban design guidelines and future zoning for the Dundas Street West Avenues Study area". The principles are:

Create a safe and enjoyable pedestrian environment;

Encourage a diversity of uses;

Select an appropriate building scale and density for the street width and neighbourhood context:

Encourage high quality architecture and diversity of building form;

Enable efficient vehicle movement and ease of transit and cyclist access;

Encourage opportunities for new open space and improve access to existing open space;

Protect the natural environment and enhance its enjoyment.

In Ms Johncox's opinion the proposal fails "to adequately fulfill the key recommendations of the study"; the mid-rise building is not massed to the Avenue; it does not respect the study boundary; it does not create a safe and enjoyable pedestrian environment and the building is inappropriate in scale and density. In her opinion the building is massed on Prince Edward Dr., making up 43% of the block. The building is located so close to the street that it encroaches on the public realm. At the proposed height, the building would offend the stipulated six-storey height limit for the Study Area.

Ms Johncox, in her Witness Statement, noted “the height limit also brought certainty to the existing residents as to the scale and potential impact of future developments. Every new development must prove that the impacts to the area are acceptable”. (emphasis added)

The Board notes that while Ms Johncox made the link between height or scale of the building and impact on the neighbourhood, the City did not adduce specific evidence about the alleged negative impact of the proposed building. The only shadow impact study introduced was that of Dunpar, which shows that there will be no negative impact on the neighbourhood to the south. As the Board noted above, the Study, in discussing impact, mandates the transition in scale of new buildings to the adjoining low-rise residential neighbourhood, and focuses on impact in two areas: traffic and schools. Neither the City nor the Kingsway Group adduced any evidence to demonstrate any negative impact on the neighbourhood in terms of traffic or schools. In fact, the Board understands that Dunpar prepared a traffic study with which the City has no concerns.

Ms Johncox addressed the issue of inappropriate precedent. In her opinion, if the proposal is permitted by the Board, it would set “a precedent for the applicant to request the same densities, heights and setbacks for his other properties. Two of these are located on the south side of Dundas St. W. and would present similar issues to the Kingsway Park East neighbourhood to the south. They would also create an eight storey condition on the south side of Dundas St. W. that is inconsistent with the recent six-storey developments in the area and further exacerbate the poor pedestrian environment he proposes for the site”.

Ms Johncox was also of the opinion that the proposal does not meet the objectives of the zoning by-law. The building is too tall; the mechanical penthouse and amenity space are so large that they constitute a storey and would be visible from the street, the 45-degree angular plane requirement is breached when it is properly measured from the R2 zone, the density is too great, more outdoor amenity space is necessary, the first story at a height of 3.4m is too low and would not accommodate live/work space, and the building would encroach on the public realm.

In considering the issue of extending the boundary of the Avenue into the Neighbourhood or the Commercial-Residential Strip into the Low-Rise Residential, Ms

