

ONTARIO MUNICIPAL BOARD

Dunpar Developments Inc. has appealed to the Ontario Municipal Board under subsection 22(7) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended, from Council's refusal or neglect to enact a proposed amendment to the Official Plan for the former City of Toronto **[sic]** to redesignate southerly portion of the lands on the southeast corner of Dundas Street West and Prince Edward Drive from Neighbourhoods to Mixed Use Areas for the purpose of permitting the proposed 10-storey, 118 units residential development
Approval Authority File No. 06 106640 WET 05 OZ
O.M.B. File No. O070017

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

LFL NOTES RE: LEGAL SUBMISSIONS

KINGSWAY RESIDENTS' MOTION

NOVEMBER 26, 2007

Introduction

1. My client is an incorporated residents' association named the Kingsway Residents Against Poor Planning ["Kingsway"].
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 the development proposal and its proposed OP designation into the residentially-designated, stable, low density neighbourhood community; and

(ii) exceeding the zoning by-law's 6 storey height limit that had been recently imposed on the site after intensive community consultation as part of a City-lead "Avenue" study.

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4. At that prehearing, Kingsway also identified certain jurisdictional concerns with the Dunpar appeal. While some no longer need to be pursued, others raised at that time remain and are included in the Kingsway Motion.

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5. In preparation for this morning's attendance, and with the Board's concurrence, the parties have agreed upon how best to proceed with this Motion:

(i) we all acknowledge proper service of the motion and responses;

(ii) we proceed with Kingsway's motion, then the City in support, then Dunpar in opposition; with only Kingsway in reply;

(iii) if either affiant [Warren Sorensen or Peter Smith] is sought to be questioned, such would occur before motion argument commencing;

(iv) once argument has concluded, the Board be requested to consider and rule upon the motion.

Email communications, November 23, 2007

6. It is respectfully requested that this panel of the Board hear and rule upon the Kingsway Motion to determine whether the Board has the jurisdiction to embark upon a hearing of the above-captioned Dunpar appeals.
7. I have arranged for the court reporter, having first filed a written request with the Board, and I believe that the Board has received the consent of all parties.

Jurisdiction Issues - Overview

8. The Kingsway Motion seeks a Board Order ruling upon three jurisdictional issues:

- (i) an Order determining that the Board is without jurisdiction to hear the appeal respecting Board File No. O070017 as the appellant was not entitled to file its appeal by reason of its failing to fulfill the statutory prerequisites of Subsections 22(4) and (6)(b) of the *Planning Act* and Section 9 of Ontario Regulation 198/96;
- (ii) an Order determining that the Board is without jurisdiction to hear the appeal respecting Board File No. O070017 as the application to which the appeal relates sought to amend the former Etobicoke Official Plan, which Plan has been repealed; and
- (iii) an Order determining that the Board is without jurisdiction to amend the current City of Toronto Official Plan as is being requested by the appellant.

Kingsway Notice of Motion

Motion Record, Tab 1, pp.1-2

- 9. It is respectfully submitted that Dunpar has not fulfilled the necessary steps to give this Board jurisdiction to consider its Section 22 appeal. [Motion grounds (i) and (iii)]
- 10. The City of Toronto ["City"] supports the requested ruling concerning (ii) and (iii) above. The City takes no position on (i) above.
- 11. Dunpar opposes the Kingsway Motion and seeks an award of costs against Kingsway.
- 12. I propose to make my submissions addressing the jurisdictional issues in the following order: (ii), (iii) and (i).

Two Initial Considerations

- 13. It is respectfully submitted that the Board has the jurisdiction to consider and grant the orders requested by the Kingsway Motion; see Sections 35 and 37(a) of the *Ontario Municipal Board Act* which provide:

Power to determine law and fact

35. The Board, as to all matters within its jurisdiction under this Act, has authority to hear and determine all questions of law or of fact.

General jurisdiction and powers

37. The Board has jurisdiction and power,

(a) to hear and determine all applications made, proceedings instituted and matters brought before it under this Act or any other general or special Act and for such purpose to make such orders, rules and regulations, give such directions, issue such certificates and otherwise do and perform all such acts,

matters, deeds and things, as may be necessary or incidental to the exercise of the powers conferred upon the Board under such Act.

Ontario Municipal Board Act Extracts
Kingsway Book of Authorities, Tab 4, p.1

14. As the Dunpar OPA application was filed on February 1, 2006, such matter is to be considered and disposed of under the *Planning Act* as it read on December 31, 2006.

O.Reg. 548/06, Subsections 1(1) and 2(a)
Kingsway Book of Authorities, Tab 1, p.1

15. It is respectfully submitted that the *Planning Act* that the Board is to apply in this instance is the version that existed prior to the Bill 51 amendments which took effect as at January 1, 2007.

16. Relevant extracts from the applicable, historical version of the *Planning Act* have been prepared for the Board's assistance.

Planning Act Extracts
Kingsway Book of Authorities, Tab 2

Jurisdictional Issue #2 – The Etobicoke Official Plan has been Repealed

17. Section 22 of the *Planning Act* is based upon a “request [to] a council to amend its official plan”.

Subsection 22(1)
Planning Act Extracts
Kingsway Book of Authorities, Tab 2, p. 1

18. Subsection (7)(c) of the *Planning Act* establishes the basis upon which this Board obtains jurisdiction in the Dunpar appeal:

Appeal to the Municipal Board

(7) A person or public body that requests an amendment to the official plan of a municipality or planning board may appeal to the Municipal Board in respect of all or any part of the requested amendment by filing a notice of appeal with the clerk of the municipality or the secretary-treasurer of the planning board if,

- (c) the council or the planning board fails to adopt the requested amendment within 180 days after the day the request is received.

Planning Act Extracts
Kingsway Book of Authorities, Tab2, p. 3

19. The sole foundation for a subsection 22(7)(c) appeal to the Board is that the “requested amendment” to the Official Plan not being adopted within 180 days.
20. On February 1, 2006 the City received from Dunpar a combined application for an Official Plan Amendment (“OPA”), Zoning By-Law Amendment (“ZBA”) and site plan approval respecting its properties at the south-east corner of Dundas Street West and Prince Edward Drive in the former City of Etobicoke.
21. The application sought permission to construct a 10 storey, 118 unit residential apartment building.
22. Dunpar’s planning consultant Peter Smith states in his Witness Statement that:

“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 6 storeys to 7 [sic] storeys.” [emphasis added]

“The subject Official Plan Amendment and rezoning applications were filed on February 1, 2006. As of that date, the Official Plans in force and effect were the Metropolitan Toronto Official Plan and the former City of Etobicoke Official Plan. Accordingly, we have analyzed the application in the context of the in-force Official Plans.... While the new [City of Toronto] Official Plan is now in effect, it is not applicable to the applications for the subject site as they were made preceding its approval.”

Peter Smith Witness Statement

Attachment “B”: Planning Rationale Report

Paras. 2.2 & 4.1, pp. 5 & 10

23. No other amendment to the in force Etobicoke Official Plan was ever applied for by Dunpar nor required in the opinion of its planning consultant.
24. On February 23, 2006 Dunpar advised the City that its development proposal would be revised and that new plans would be submitted.
25. The application was eventually revised on June 16, 2006 with the submission of revised plans depicting a 8 storey [7 residential floors plus rooftop amenity area], 85 unit residential apartment building.
26. A further set of revised site plan drawings were submitted to the City on October 16, 2007.
27. At no time after its original February 1, 2006 application did Dunpar ever suggest that any other amendment to the Etobicoke Official Plan was required nor did it seek any other amendment to that Plan.

28. It is respectfully submitted that the only OPA application that can be appealed to this Board is the Dunpar application to amend the Etobicoke Official Plan seeking an increase in the maximum permitted height above 6 storeys.
29. As it pertains to the subject lands, the Etobicoke Official Plan was repealed by this Board on July 6, 2006.

OMB Decision/Order No 1928
Kingsway Book of Authorities, Tab 9, p. 2

30. On January 16, 2007 Dunpar's solicitors appealed the OPA and ZBA to this Board based upon the failure of City Council to render a decision on the applications within the respective time frames set out in the *Planning Act*.
31. Dunpar's January 16, 2007 appeal letter to the Board had attached to it a proposed amendment to the new Toronto Official Plan as does Peter Smith's recent Witness Statement.

Peter Smith Witness Statement

Attachment "C": Planning Rationale Report

32. That proposed amendment seeks to redesignate the southerly portion of the subject lands from the new designation of "Neighbourhoods" to the new designation of "Mixed Use Areas" as both are contained in the new policy framework that is the new Toronto Official Plan.
33. Some background information is required respecting the adoption, Ministerial Decision, appeals from and approval of the new Toronto Official Plan.
34. At the time of amalgamation a decade ago, the new City assumed the existing official plans of the seven former municipalities.
35. By its By-Law No. 1082-2002, passed November 22, 2002, the City adopted the new Official Plan and repealed the seven official plans it had assumed. Said By-Law provided, however, that these repeals would only become effective once the new Official Plan received approval under the *Planning Act*.
36. The new Official Plan was forward to the Ministry of Municipal Affairs and Housing for approval. On March 17, 2003 the Ministry issued a Decision to approve the new Official Plan in part, with modifications.
37. The Ministry's Decision was the subject of 163 appeals. Certain appeals were to the Plan in its entirety; therefore none of the new Plan would come into force until the Board dealt with such appeals.

38. By its Decision/Order No. 1928, issued on July 6, 2006, this Board granted partial approval to the new Official Plan, and repealed the seven assumed official plans, except for certain exceptions outlined in Attachment 8 to such Order [which are not relevant nor applicable to this motion].
39. The new Official Plan was not appealed [by Dunpar or others] as it pertains to the subject lands and Dunpar never sought status at the hearing of the new Official Plan appeal.
40. The new Official Plan policies came into full force and effect as same pertain to the subject lands as of July 6, 2006.
41. As of July 6, 2006 the Etobicoke Official Plan was repealed as same pertains to the subject lands.

Warren Sorensen Affidavit, paras. 11-18

Motion Record, Tab 2, pp. 3-4

42. It is respectfully submitted that Dunpar's OPA application described above became moot as of July 6, 2006. There remains nothing left of the Etobicoke Official Plan to amend.
43. As noted above, Peter Smith's witness statement states, in part, that "while the new Official Plan is now in effect, it is not applicable to the applications for the subject site as they were made preceding its approval."
44. Notwithstanding this, and as noted above, both Dunpar's January 16, 2007 appeal letter under Board File No. O070017 and Peter Smith's witness statement, including its Attachment "C", seek to amend the new Official Plan as it pertains to the subject lands by redesignating a portion of the subject lands to a different land use designation category.
45. It is respectfully submitted that this Board has no jurisdiction to consider an appeal that is not properly before it.
46. An appeal from an application to amend the Etobicoke Official Plan respecting maximum permitted height is moot as such Plan has been repealed as it pertains to the subject lands. The entire policy framework that was the former Etobicoke Official Plan [and the other six former Official Plans] has been replaced with an entirely new planning framework in the new Toronto Official Plan.
47. It is respectfully submitted that the foundation for the Board's jurisdiction has been removed by the repeal of the former Etobicoke Official Plan by this Board's Decision/Order No. 1928.
48. It is respectfully submitted that no one can breathe life into Dunpar's moribund OPA appeal.

Jurisdictional Issue #3 – The Board Cannot Amend the New Toronto Official Plan

49. As noted above, the new Toronto Official Plan was not appealed [by Dunpar or others] as it pertains to the subject lands and Dunpar never sought status at the hearing of the appeals respecting the new Toronto Official Plan.
50. Further, Dunpar has never applied to amend the new Official Plan as it pertains to the subject lands.
51. Notwithstanding the above, both Dunpar's January 16, 2007 appeal letter under Board File No. O070017 and Peter Smith's witness statement, including its Attachment "C", seek to amend the new Official Plan as it pertains to the subject lands.
52. It is respectfully submitted that neither Dunpar nor the Board can convert the present appeal of Dunpar's application to amend the Etobicoke Official Plan into an amendment to the new Toronto Official Plan.
53. The Board's case management and consideration of the new Toronto Official Plan commenced over three years ago upon its receipt of the numerous appeals from the Ministerial Decision to approve, as modified, the new Official Plan.
54. The Board has described its hearing of the new Toronto Official Plan as almost *sui generis* in refusing to add the University of Toronto as a party to the proceedings.

OMB Decision/Order No. 0688

Kingsway Book of Authorities, Tab 10, pp. 2-3

55. It is respectfully submitted that similar and consistent reasoning would preclude Dunpar from requesting or this Board permitting an amendment to an Official Plan for which there has been no amendment application made nor appeal therefrom filed.
56. In Dunpar's Response to Motion, ground (xiv) addresses the City of Toronto's jurisdiction to amend its new Official Plan and gives 15 examples where the City has adopted OPAs to the new Official Plan.
57. With respect, these examples are not relevant nor germane to the jurisdictional issue being raised by Kingsway.
58. No one questions the City's ongoing jurisdiction to amend its new Official Plan. Nor is the City precluded from adopting such amendments in its wisdom, even where a landowner initially requested such an amendment at some earlier point

in time. Once adopted by the City, the OPA becomes a city-adopted OPA subject to appeal under the relevant *Planning Act* provisions.

59. It is respectfully submitted that an entirely different situation pertains when a council chooses not to make a requested amendment to its Official Plan. A landowner's rights are as set out under section 22 of the Planning Act and compliance with its provisions are required to become entitled to that appeal right.

Jurisdictional Issue #1 – Compliance with Subsection 22(4) & (6)(b) of the Planning Act

60. The relevant extracts from Section 22 of the applicable *Act* are as set out below:

Prescribed information

(4) A person or public body that requests an amendment to the official plan of a municipality or planning board **shall provide the prescribed information** and material to the council or planning board.

Refusal and timing

(6) **Until a council** or planning board **has received the prescribed information** and material required under subsection (4) and any fee under section 69,

(a) the council or planning board may refuse to accept or further consider the request for an amendment to its official plan; and

(b) **the time periods referred to in clauses (7) (c) and (d) do not begin.**

Appeal to the Municipal Board

(7) A person or public body that requests an amendment to the official plan of a municipality or planning board may appeal to the Municipal Board in respect of all or any part of the requested amendment by filing a notice of appeal with the clerk of the municipality or the secretary-treasurer of the planning board if,

(c) the council or the planning board fails to adopt the requested amendment within 180 days after the day the request is received....

[emphasis added]

Planning Act Extracts

Kingsway Book of Authorities, Tab 2

61. "Prescribed" means laid down or imposed authoritatively.

Canadian Oxford Dictionary (2d ed.)

Kingsway Book of Authorities, Tab 6

62. Section 9 of O.Reg. 198/96, as amended, provided that "the information and material to be provided by an applicant under subsection 22(4) are set out in the Schedule."

63. The Schedule attached to O.Reg. 198/96, as amended, provided as follows:

INFORMATION AND MATERIAL TO BE PROVIDED UNDER SUBSECTION 22
(4) OF THE ACT

1. The name, address and telephone number of the applicant.
2. The name of the municipality or planning board which was requested to initiate the amendment to its official plan.
3. The date of the request to the municipality or planning board to initiate the proposed amendment to the official plan.
4. **The name of the official plan proposed to be amended.**
5. The description of the subject land, such as the municipality, geographic township in territory without municipal organization, concession and lot numbers, reference plan and part numbers and name of street and number.
6. The approximate area of the land covered by the proposed amendment, if applicable and if known.
7. **Whether the proposed amendment changes, replaces or deletes a policy in the official plan.**
8. **If the answer to item 7 is yes, the policy to be changed, replaced or deleted.**
9. **Whether the proposed amendment adds a policy to the official plan.**
10. If the proposed amendment changes, replaces, deletes or adds a policy, the purpose of the proposed official plan amendment.
11. **If applicable, the current designation of the subject land in the official plan and the land uses which are authorized by the designation.**
12. **Whether the proposed amendment changes or replaces a designation in the official plan.**
13. **If the proposed amendment changes or replaces a designation in the official plan, the designation to be changed or replaced.**
14. The land uses which would be authorized by the proposed official plan amendment.
15. Whether the subject land or any land within 120 metres of the subject land is the subject of an application made by the applicant for approval of an official plan amendment, a zoning by-law amendment, a minister's zoning order amendment, a minor variance, a plan of subdivision, a consent or a site plan.
16. If the answer to item 15 is yes and if known, the file number of the application, the name of the approval authority considering the application, the lands affected by the application, the purpose of the application, the status of the application and the effect of the application on the proposed amendment.
17. **The text of the proposed amendment if a policy in the official plan is being changed, replaced or deleted or if a policy is being added to the official plan.**
18. **The proposed schedule to the official plan if the proposed amendment changes or replaces a schedule in the official plan and the text that accompanies the schedule.**

19. An affidavit or sworn declaration by the applicant certifying that the information required under this Schedule and provided by the applicant is true.

[emphasis added]

64. Dunpar's entitlement to launch its appeal to this Board must be properly founded upon compliance with fulfilling the statutory prerequisites for such an appeal.

Paletta International Corp. v. Burlington (City) (SCJ)

Kingsway Book of Authorities, Tab 7, p. 673, para. 16

65. Unless and until one complies with subsections 22(4), the 180 day time period mentioned in 22(6)(b) does not begin to run.

Paletta International Corp. v. Burlington (City) (CA)

Kingsway Book of Authorities, Tab 8, p. 285-6, paras. 4, 8

66. It is respectfully submitted that Dunpar patently failed to provide much of the statutorily prescribed information outlined above; including listing what official plan it sought to amend; how its site was designated; what existing policies were being changed; and providing the text and schedules of the actual proposed amendment.

67. The 180 day time period had not begun to run when Dunpar's solicitors filed the present appeal to this Board.

68. This Board has no jurisdiction to consider an appeal that is not properly before it. Dunpar has failed to meet the substantial statutory prerequisites that must be met before one is entitled to launch an appeal.

69. Neither Dunpar nor the City, acting either individually or in concert, may waive compliance with the statutory prerequisite which triggers 22(6)(b).

70. This Board has no jurisdiction to waive compliance with these statutory obligations.

71. In Dunpar's Response to Motion grounds (i)-(xiii), much is made of the fact that Council appears to have chosen to process Dunpar's application and outlines the steps taken by the City.

72. It is acknowledged that subsection 22(6)(a) of the *Planning Act* gives the municipal council the sole discretion to commence processing an incomplete application or to refuse to accept or further consider a requested amendment to its Official Plan.

73. However, it is respectfully submitted that whether a council chooses to exercise its discretion to process an application or not does not turn an incomplete

application into a complete one; nor does it trigger the start of the 180 day period under subsection 22(6)(b) of the *Planning Act*.

74. It is respectfully submitted that subsections 22(6)(a) and (b) are distinct and discrete from one another.
75. Despite the assertion in grounds (i) and (iv) of Dunpar's Response to Motion that all required prescribed information was submitted by Dunpar, no supporting material is provided indicating that Dunpar submitted the following prescribed information to the City as required:
- (i) The name of the official plan proposed to be amended.
 - (ii) Whether the proposed amendment changes, replaces or deletes a policy in the official plan.
 - (iii) If the answer to the above item is yes, the policy to be changed, replaced or deleted.
 - (iv) Whether the proposed amendment adds a policy to the official plan.
 - (v) If applicable, the current designation of the subject land in the official plan and the land uses which are authorized by the designation.
 - (vi) Whether the proposed amendment changes or replaces a designation in the official plan.
 - (vii) If the proposed amendment changes or replaces a designation in the official plan, the designation to be changed or replaced.
 - (viii) The text of the proposed amendment if a policy in the official plan is being changed, replaced or deleted or if a policy is being added to the official plan.
 - (ix) The proposed schedule to the official plan if the proposed amendment changes or replaces a schedule in the official plan and the text that accompanies the schedule.

Warren Sorensen Affidavit, paras. 4-7

Motion Record, Tab 2, pp. 2-3

76. Issues respecting the "completeness" of an application in the future will be guided by the Bill 51 amendments to the Planning Act. Council will now be required to formally advise an applicant of an application's "completeness" or lack thereof; and this Board has now been granted the added authority to consider motions determining that issue.

Other Submissions

77. It is respectfully submitted that the resolution of jurisdictional questions do not depend upon inconvenience, hardship nor prejudice. There is no "balancing of interests" involved.
78. Rather, such are legal questions asking:

"Does the Board has jurisdiction or not?";

"Has the applicant/appellant fulfilled all of the necessary steps prior to initiating its appeal?"; and

"Is an appeal moot?"
79. Raising these jurisdictional issues is not for the purpose of delay.
80. Notice of the jurisdictional challenge was given at the initial prehearing conference. The Board set a hearing date greater than 180 days from such prehearing conference, during which Dunpar had the opportunity to file an application to amend the new Toronto Official Plan.
81. The original motion dates respecting the jurisdictional issues were released, on consent of all parties, to permit a Board mediation and further without prejudice discussions between the parties. Such process concluded in September, 2006.
82. Granting Kingsway's Motion will not bring planning to a halt. In order to ensure that their OPA applications would not become moot, other landowners wisely appealed the new Toronto Official Plan as same pertained to their lands and the Board recognized and protected those who did so.
83. It is respectfully submitted that the "Clergy" principle is not relevant or germane to the jurisdictional issues raised in the Kingsway Motion and are required to be considered by this Board.
84. I will reply to all legal submissions made by the other parties.
85. I reserve the right to make submissions respecting costs at the appropriate time upon the direction of the Board.

Respectfully Submitted November 26, 2007

Leo F. Longo

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