

ISSUE DATE:

Dec. 03, 2007



PL070056

Ontario Municipal Board
Commission des affaires municipales de l'Ontario

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 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

APPEARANCES:

Parties

Counsel

Dunpar Developments Inc.

A. Brown and N. Berens(Student at Law)

for Kingsway Residents Against Poor
Planning

L. Longo

City of Toronto

S. Bradley

**MEMORANDUM OF ORAL DECISION DELIVERED BY N. JACKSON ON
NOVEMBER 27, 2007 AND ORDER OF THE BOARD**

The Board has before it private appeals by Dunpar Developments Inc. (Dunpar) for an Official Plan Amendment, Zoning By-law Amendment and Site Plan referral to permit what was originally a 10-storey apartment building at the southeast corner of Dundas Street West and Prince Edward Drive, in the City of Toronto. In discussions

with the City, the building has now been reduced to 7 stories for residential use and an eighth storey for what is termed enclosed amenity space.

The Parties have agreed that at the commencement of the Hearing, a Motion is to be heard brought by Kingsway Residents Against Poor Planning (Kingsway). Notice of this Motion was given orally in a Board pre-hearing and is reflected in Board Decision/Order No.1530. Formally Notice of Motion is now filed with supporting affidavit. Responses to the Motion by the City of Toronto (City) and Dunpar (with affidavit) are filed. Dunpar's Response includes a separate Notice of Motion for Costs. There are no preliminary objections as to timeliness or jurisdiction to hear the Motion. The Board, under the authority of *Ontario Municipal Board Act* sections 35 and 37(a), has broad authority to determine questions of law and fact and may make such orders as necessary to the exercise of its powers under that Act.

Kingsway seeks a Board Order determining that the Board is without jurisdiction to hear the Appeal respecting the Official Plan Amendment (Board file O070017). The relief sought is that the Board is firstly without jurisdiction to hear the Official Plan Appeal as it relates to an amendment to either the former Etobicoke Official Plan and the current Toronto Official Plan. The relief sought is secondly that the Board is without jurisdiction to hear the Official Plan Appeal since the Appellant has not fulfilled the statutory prerequisites of subsections 22(4) and (6)(b) of the *Planning Act* and the related Regulation 198/96.

The City is in support of the first ground for relief sought respecting jurisdiction to amend the Etobicoke Official Plan and the new Toronto Official Plan. The City takes no position on the second ground for relief regarding the statutory prerequisites of filing an Official Plan Appeal.

Dunpar vigorously opposes both grounds for relief.

The following are the relevant chronological events:

1. Dunpar filed an Application to amend the Official Plan, amend the Zoning By-law and for site plan approval on February 1, 2006. (Prior to the effective date of Bill 51 *Planning Act* amendments).

2. Revisions were made on June 16, 2006 from 10 stories to 7 plus rooftop amenity space and reduction in units from 118 to 85. Further revisions were made on October 16, 2007 respecting access.
3. The Ontario Municipal Board in conducting hearings to the new Toronto Official Plan repealed the Etobicoke Official Plan with exceptions –Board Decision/Order No. 1928 dated July 6, 2006. The City had previously repealed the Etobicoke Plan in By-law 1082-2002 on November 22, 2002 in adopting its new Official Plan. That repeal was however not effective until appeals to the new Official Plan were dealt with. Dunpar did not appeal the new Toronto Official Plan and did not take part in the hearings related thereto. The Dunpar property is not within the exceptions in Order No. 1928.
4. Dunpar Appealed under section 22 of the *Planning Act* on January 16, 2007 in respect the failure to approve of an Official Plan Amendment, Zoning By-law Amendment and Site Plan.

The Board finds that at the time of Dunpar Appeal under section 22 of the *Planning Act* that the Etobicoke Official Plan had been repealed. The Appeal after the repeal cannot revive an instrument that did not exist on the date of the Appeal. The Etobicoke Official Plan did exist on the date of the Application but the Application does not bring jurisdiction to this Board. The OMB functions as a statutory Appeal body and appeal rights must be strictly observed to allow the Board to exercise its jurisdiction conferred under the *Planning Act*. It is a nullity to appeal for an Official Plan Amendment to an Official Plan that no longer exists on the date of the appeal. Mr. Brown argues well that the Board does not allow technicalities to interfere with its determinations of what amounts to good planning and exercises fairness in doing so. He points to some 15 cases where Official Plan Amendments were sought to former Official Plans that resulted in amendments to the new Toronto Official Plan and questions whether it was necessary to appeal the new Toronto Official Plan when Dunpar had appealed the predecessor Etobicoke Official Plan. Those 15 cases have not been fully explored on this Motion. It is apparent however that the City chose or agreed to pass its amendments to the new Official Plan after appeals were made to earlier Official Plans. In the present case, the City opposes the Amendment and is not willing to pass an

amendment to its new Official Plan. There may have been applications to both the former Official Plan and the new Official Plan in those cases. In the present case, the Board accepts Mr. Brown's position that notwithstanding wording of a proposed amendment to the current Official Plan in his witness statement, exhibit 10, that it is amendment to the Etobicoke Official Plan that is sought in the Appeal, that Plan being in effect at the time of his Application.

It is true and is conceded by the other parties that Dunpar could apply to amend the current Toronto Official Plan and then appeal either a refusal or delay to this Board. Notwithstanding this being raised in an earlier Board pre-hearing, Dunpar has chosen not to do so and the current Official Plan Appeal is to a non-existing instrument, the former Etobicoke Official Plan, it having been repealed. The Board is not able to "morph" the Appeal from the non-existing Official Plan into an Appeal of the current Official Plan as argued. When the University of Toronto did not formally appeal the new Official Plan, the Board, in Decision/Order No. 0688, denied the University standing as a Party in the Appeal hearings to the new Official Plan.

The second ground relates to a lack of clarity and detail in the original application to amend the Official Plan. Section 22 of the *Planning Act* refers to Prescribed Information to be put to the Council in an amendment request for the Official Plan. The importance of the Prescribed Information is in the consequence of not providing it - Section 22(6) states that until council has received the prescribed information - Appeal periods do not begin to run. In this case the appeal period for the private appeal does not run under section 22(7)c until 180 days after the request is received. The Prescribed Information is set out in section 9 of Regulation 198/96. By affidavit evidence it is stated that the regulation is not adhered to respecting;

- which official plan is proposed for amendment
- the nature of the changes sought in designation and policy
- and whether changes are made to a schedule to the official Plan

Dunpar does not dispute these allegations but argues that the City has condoned the act of filing the application incompletely, by acknowledging its receipt without pointing out missing information. Moreover the City then processed the application

through public meetings and in two reports that dealt with the application. The City takes no position on this part of the Motion.

The Board acknowledges the difficulty of the City position and that the City, because of its actions, cannot claim the benefit of the Regulation. Mr. Brown goes further to argue the remedy is not available to the third-party Kingsway - and that is only available to the City . The Board has carefully considered this ground. There is a difference between Prescribed Information and required information. Required information is additional information sought by the municipality over and above the requirements of Regulation 198/96. Required Information has resulted in litigation and subsequent amendments to the *Planning Act* (Bill 51, not applicable in the timing of this case and Application). Prescribed Information is to be provided to the City but there is nothing in the Regulation to suggest that the Information or the failure to provide it cannot be relied upon by another person or in this case a Party to this Proceeding-Kingsway. The Board finds failure to provide the Prescribed Information that is required by Law in the Regulation and the *Planning Act*. The failure to provide the Prescribed Information in this case, particularly when raised with the first ground, creates a situation that by Operation of Law, the required 180-day appeal period has not begun to run. The Official Plan Appeal fails on this ground.

Mr. Brown has argued the Clergy principle - that in fairness, an application is to be evaluated under planning policies in effect at the time of his Application - Greater Toronto Airports Authority v. Clergy Properties Ltd. [1998] O.J. No. 340(C.A.). That principle does not bend statutory requirements and does not apply in cases where transition is clear by statute and Board Order. It will apply still in this Hearing for the Zoning By-law application, site plan and whatever else is applied for and properly appealed. The Zoning By-law and Site Plan referral were filed at a time when the Etobicoke Official Plan was in effect. The weight to be given to evidence on the former Etobicoke Official Plan and the current Toronto Official Plan is a matter for the Hearing and not this Motion. The Board acknowledges that in submissions and in the Appellants' materials exhibit 10, it is opined that an amendment to the former Etobicoke Official Plan and to the current Toronto Official Plan are not required since the Application for Zoning By-law Amendment conforms generally with both Official Plans. This is an issue for the Hearing.

For the above reasons, on both grounds the Board finds it does not have jurisdiction to hear an Appeal for an Amendment to the former Etobicoke Official Plan, nor an Appeal for an amendment to the Toronto Official Plan - for which at this time no Application has been made. The Motion is granted. It is agreed that the Dunpar Motion for Costs and the Kingsway request to make submissions as to Costs will be heard by the panel on the Hearing, at the conclusion of the Hearing. This panel is not seized of the Hearing for the remaining Zoning By-law Amendment and Site Plan referral.

At the conclusion of the Motion and delivery of this Decision, Mr. Brown asked for a different panel for the Hearing due to overlap of Motion issues with issues for the Hearing. The Motion was important and this panel agreed with the request. Agreement on the start date was not reached. Since the Hearing time had been set and there is a need to commence if the evidence is to be completed and parties were well aware of the timing, the Hearing will commence Wednesday, November 28, 2007 at 10:00 a.m. at the Board's Offices. Some oral notice was given that a further Motion regarding conformity of the proposed Zoning By-law Amendment with the Official Plans is being considered and may be brought at the commencement of the Hearing.

So Orders the Board.

"N. M. Jackson"

N. M. JACKSON
MEMBER