

Ontario Land Tribunal
Tribunal ontarien de l'aménagement
du territoire



ISSUE DATE: January 02, 2024

CASE NO(S): OLT-22-004678

PROCEEDING COMMENCED UNDER subsection 34(19) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant: Bayview Cumber Neighbourhood Association
Appellant: LiVante Holdings (Cummer) Inc.
Subject: Zoning By-law 818-2022 to amend Zoning By-law 569-2013
Description: To permit a three-storey apartment building containing up to 60 dwelling units
Reference Number: 22 109344 NNY 18 OZ
Property Address: 175 Cumber Avenue
Municipality/UT: City of Toronto
OLT Case No.: OLT-22-004678
OLT Lead Case No.: OLT-22-004678
OLT Case Name: Bayview Cumber Neighbourhood Association and LiVante Holdings (Cummer) Inc. v. Toronto (City)

Heard: November 1, 2 and 3, 2023 by Video Hearing

APPEARANCES:

Parties

Bayview Cumber Neighbourhood Association, LiVante Holdings (Cummer) Inc., and Voices of Willowdale Inc.

City of Toronto

Counsel

Eric Gillespie

Laura Bisset
Marc Hardiejowski

DECISION OF ASTRID J. CLOS AND ORDER OF THE TRIBUNAL

[1] The Tribunal convened a Merit Hearing (“MH”) with respect to appeals filed by the Bayview Cummer Neighbourhood Association (“BCNA”) and LiVante Holdings (Cummer) Inc. (“LiVante”) pursuant to s. 34(19) of the *Planning Act*, (“Act”) against the approval of By-law 818-2022 (“ZBA”) by the City of Toronto (“City”), an amendment to the City Zoning By-law 569-2013 (“ZBL”).

[2] The lands affected by the ZBA are known municipally as 175 Cummer Avenue (“Subject Property”). The purpose of the ZBA would be to allow the City to further develop the Subject Property with a three-storey apartment building containing a maximum of 60 units (“Proposed Development”) for people leaving homelessness.

[3] Non-appellant Party status was granted by the Tribunal to Voices of Willowdale Inc. (“VOW”) at the Case Management Conference (“CMC”) convened on June 29, 2023. 30 Participant status requests were also granted at the CMC as listed in that decision.

[4] The three Parties in opposition to the ZBA co-operated and retained Eric Gillespie as their Counsel and Michael Manett as their Planning witness. Together the Parties raised one issue with the proposed ZBA related to the compatibility of the Proposed Development with the existing Willowdale Manor.

[5] The Tribunal convened a three-day MH. Due to the number of Participants interested in this matter, the Tribunal made available a live streaming format (in addition to the virtual hearing platform) to allow Participants and interested members of the public to view the hearing.

LEGISLATIVE FRAMEWORK

[6] The Tribunal in carrying out their responsibilities shall have regard to, among other matters, matters of provincial interest as set out in s. 2 of the Act.

[7] When making a decision relating to a planning matter, the Tribunal shall have regard to any decision made by a municipal council or approval authority and any information and material considered by a council or approval authority in making the decision as set out in s. 2.1(1) of the Act.

[8] A decision of the Tribunal in respect of any authority that affects a planning matter, shall be consistent with the Provincial Policy Statement, 2020 (“PPS”) and shall conform with or shall not conflict with the Growth Plan for the Greater Golden Horseshoe, 2020 (“GP”) as set out in s. 3(5) of the Act.

[9] Any decision of the Tribunal shall be made pursuant to s. 24(1) of the Act, in that where an official plan is in effect, no by-law shall be passed for any purpose that does not conform therewith.

SUBJECT PROPERTY AND SURROUNDING AREA

[10] The Subject Property is owned by the Toronto Community Housing Corporation (“TCHC”), which is a City corporation. The site is currently occupied by a four-storey TCHC apartment building, housing approximately 600 seniors known as Willowdale Manor, which will remain.

[11] The Subject Property has a frontage of approximately 124.5 metres (“m”) on Cummer Avenue, and a depth of approximately 179.1 m. The property is generally rectangular with an

irregular boundary along the east side. The total site area of 175 Cummer Avenue, including both Areas A and B as identified in the ZBA, is approximately 21,187.1 square metres ("m²").

[12] The surrounding land uses to the Subject Property include,

- north - detached dwellings located on the opposite side of Cummer Avenue including homes under construction by LiVante;
- east - Cummer Lodge (205 Cummer Avenue);
- south - Newtonbrook Park trail and ravine;
- west - Willowdale Avenue and detached dwellings.

[13] The Subject Property is located in Toronto, in the former city of North York with pedestrian access to both Cummer Avenue and Willowdale Avenue. These streets are both classified as 'Minor Arterial Roads' in the City's Road Classification System, and both streets have bus service.

[14] Willowdale Manor is set back from Cummer Avenue by approximately 50 m. The area between the existing apartment building and Cummer Avenue is occupied by a driveway/pick-up and drop-off loop, a lawn and a variety of trees.

[15] Vehicle access to the Subject Property is via a driveway to Cummer Avenue which is shared with 205 Cummer Avenue, the abutting property to the east.

[16] While the Subject Property and 205 Cummer Avenue share vehicular access and parking, they are separate lots. 205 Cummer Avenue accommodates a long-term care facility, operated by the City, known as Cummer Lodge. Cummer Lodge has approximately 391 residents.

HISTORY AND PUBLIC CONSULTATION

[17] On March 10, 2021 City Council initiated a Ministerial Zoning Order (“MZO”) request for the Modular Housing Initiative: Phase Two Site - 175 Cummer Avenue. The Council decision also requested that a final recommendation not be brought forward until community consultation meetings had taken place.

[18] The City undertook public promotion and awareness efforts including:

- a) Detailed notices placed on site, which were posted in English, Chinese (simplified and traditional), Farsi and Korean;
- b) Letters and information mailed to local addresses;
- c) Letters, information and feedback forms mailed to residents of Willowdale Manor in English, Chinese, Farsi, Korean, and Russian;
- d) A dedicated project website was created, and;
- e) Social media.

[19] Residents and anyone interested could contact or engage regarding the project through:

- The dedicated community liaison (a consultant);
- Telephone via a dedicated phone line;
- Email;
- By participating in an event (online or by telephone);
- By responding via one of the feedback forms (i.e. by standard mail);
- By writing a letter (standard mail);
- Through social media, and;
- By contacting their Councillor.

[20] On March 9, 2021 at 11 a.m. a meeting held by the City dedicated to Willowdale Manor residents and their families was attended by 46 participants.

[21] On March 9, 2021 at 7 p.m. a community engagement meeting, was attended by 160 participants.

[22] On March 26, 2021 a meeting dedicated to Toronto Community Housing Corporation (TCHC) staff and the chair of the Responsible Personal Accessibility in Toronto Housing (R-PATH) was held.

[23] On March 30, 2021 a meeting was hosted by Councillor Filion with the Bayview Cummer Neighbourhood Association, which was attended by 55 participants.

[24] On April 6, 2021 at 7 p.m. the City held a community engagement meeting attended by 172 participants.

[25] On June 8, 2021 City Council adopted Modular Housing Initiative: Phase Two – 175 Cummer Avenue – Final Report. This report presented a summary of the public engagement undertaken; changes made to the proposal and recommended that City Council request the MZO to provide relief from the in-force zoning regulations to permit the Proposed Development.

[26] In June 2021 the City submitted the MZO request to the Province.

[27] In July 2021 the Minister requested that the City undertake further public engagement regarding the Proposed Development.

[28] On August 12, 2021 the City held a further public engagement event in response to the Minister's request with 125 attendees. A summary of that consultation was provided to the Province in August of 2021.

[29] On March 9, 2022, after not having had a decision on its MZO request for almost a year, City Council directed staff to undertake a municipal rezoning process to provide the necessary relief to the in-force zoning regulations to permit the modular supportive housing development at 175 Cummer Avenue.

[30] On April 4, 2022 the City held a further public engagement event, this time for the City-initiated zoning by-law amendment. The event was promoted on the dedicated website, through flyers mailed to the local community, a posting on site, social media, email and other methods. The meeting was attended by 220 participants.

[31] On April 27, 2022 public deputations were heard by the City Planning Housing Committee.

[32] On July 22, 2022 City Council adopted Modular Housing Initiative: Phase Two - 175 Cummer Avenue - City Initiated Rezoning - Final Report, which included adoption of zoning by-law amendment 818-2022 ("ZBA") to permit the modular supportive housing development at 175 Cummer Avenue.

[33] The ZBA was subsequently appealed to the Tribunal by LiVante Holdings (Cummer) Inc. and Bayview Cummer Neighbourhood Association Inc. The Tribunal granted non-appellant Party status to Voices of Willowdale in accordance with Rule 8.3 of the *Ontario Land Tribunal Rules of Practice and Procedure* ("OLT Rules").

CHANGES MADE TO THE PROPOSAL

[34] Based on the feedback received through community engagement and the detailed review of the Site Plan application by City staff and agencies, a number of changes were made to the proposal. These changes include:

- Reducing the unit count from 64 to 60,
- Increasing the size of the dining and lounge area,
- Increasing the size of the tenant support area,
- Integrating waste storage into the building and increasing its size to support tidy operations,
- The retention of one additional mature tree by adjusting the siting of underground utilities,
- Increased lighting along site walkways and within the outdoor amenity space,
- Application of Toronto Green Standard requirements (e.g. bird-friendly glazing),
- Increasing the width of the adjacent sidewalk to 2.1 m,
- Extending concrete bus platforms on Cummer Avenue and Willowdale Avenue to the standard 16 m and state of good repair to these platforms,
- Improvements to building cladding design for the east and west modules,
- The addition of cedar cladding on the east and west elevations,
- The addition of colour window coverings,
- Relocating bicycle parking to the north-east portion of the site,
- Improvements to circulation throughout site with upgrades for on-site accessibility,
- Additional landscape areas along the west side of the building adjacent to the open space,
- Landscape improvements along the north-south pedestrian walkway,
- Reconfiguration of the wood fence along the south side of the site so that two clusters of spruce trees will be located on the outside of the fence, and

- The addition of seating areas at the building entrance along Cummer Avenue and reinstatement of benches along the north-south pedestrian walkway.

THE PROPOSAL

[35] The Proposed Development is funded by the Federal Government, jointly with the City, through the Affordable Housing Innovation Fund. The proposed apartment building is intended to house people currently experiencing homelessness. The proposal is supportive housing where the tenants will pay rent.

[36] The City-initiated ZBA is for a three-storey apartment building on the Subject Property municipally known as 175 Cummer Avenue. The Proposed Development would consist of an apartment building containing up to 60 dwelling units, with shared amenities, including laundry facilities, and indoor and outdoor amenity space.

[37] The indoor amenity space is proposed to consist of communal dining and lounge space, kitchen and laundry facilities, meeting rooms, administrative offices and tenant support services (to be operated by a housing provider). The outdoor amenity space is proposed to include landscaping, seating, privacy fencing and a pergola.

[38] The Proposed Development would be accessed by vehicles via the existing driveway on site and the existing number of parking spaces on site would be maintained.

[39] The City-initiated ZBA amendment application was adopted by City Council as Zoning By-law 818-2022.

EVIDENCE

[40] The Joint Document Book consisting of Volumes, I, II, III and IV was entered as **Exhibit 1**.

[41] The City called Matt Armstrong who was qualified by the Tribunal without objection to provide expert evidence in the area of land use planning and urban design. Mr. Armstrong referenced **Exhibit 2** - Witness Statement, **Exhibit 3** - Graphics Package, **Exhibit 4** – Photo Book, **Exhibit 5**- Google Street View Images, **Exhibit 6** – Lot Study, and **Exhibit 7** – Notice Sign Photos.

[42] The Appellant called Michael Manett who was qualified by the Tribunal without objection to provide expert evidence in the area of land use planning. Mr. Manett referenced **Exhibit 8** – Witness Statement, **Exhibit 9** – Reply Witness Statement and **Exhibit 10** – Visual Exhibits.

[43] The Tribunal notes that the Exhibits were referenced by both witnesses as it assisted with presenting and explaining their evidence.

[44] The Tribunal found that the comportment and evidence of both Mr. Armstrong and Mr. Manett was professional, thoughtful and provided earnestly to assist the Tribunal in reaching a decision.

AREAS OF AGREEMENT

[45] There were a number of areas of agreement provided in the evidence and opinions provided by Mr. Armstrong and Mr. Manett.

Planning Act, Section 2

[46] Mr. Armstrong advised that s. 2 of the Act identifies matters of provincial interest, including the following which he considers relevant to the ZBA:

(h) and (o) which identify the orderly development of safe and healthy communities, and protection of public health and safety,

(h.1) which identifies that accessibility for persons with disabilities to all facilities, services and matters to which the Act applies,

(j) which identifies the adequate provision of a full range of housing, including affordable housing,

(p) and (r) which identify the appropriate location of growth and development and built form that is well-designed and contributes to placemaking, and

(q) which identifies that development be designed to be sustainable, support public transit and be oriented to pedestrians.

[47] Mr. Armstrong provided his opinion that the ZBA has had regard for the relevant matters of provincial interest in particular s. 2 (h), (o), (h.1), (j), (p), (r) and (q) of the Act.

[48] Mr. Manett confirmed that he is in agreement with Mr. Armstrong's opinion that the ZBA has had regard for s. 2 of the Act.

Provincial Policy Statement (“PPS”)

[49] Mr. Armstrong reviewed the PPS and provided his opinion that the proposed ZBA will accommodate affordable multi-unit residential housing through intensification which will meet the housing needs for current and future residents in a location with an appropriate level of infrastructure. It was Mr. Armstrong’s opinion that the ZBA will promote densities for new housing which will efficiently use land, resources, infrastructure and public services facilities and support the use of active transportation and transit. Mr. Armstrong provided his opinion that the ZBA is consistent with the PPS.

[50] Mr. Manett confirmed that he is in agreement with Mr. Armstrong’s opinion that the ZBA is consistent with the PPS.

Growth Plan for the Greater Golden Horseshoe (“GP”)

[51] Mr. Armstrong reviewed the GP and provided his opinion that the ZBA supports the achievement of complete communities by diversifying the overall housing stock across the municipality, providing a choice, range and mix of housing options including affordable housing in conformity with the GP. Mr. Armstrong provided his opinion that the ZBA is in conformity with the GP.

[52] Mr. Manett confirmed that he is in agreement with Mr. Armstrong’s opinion that the ZBA is in conformity with the GP.

City of Toronto Official Plan (“OP”)

[53] Mr. Armstrong reviewed the OP policies which in his opinion were the applicable policies related to the proposed ZBA. Mr. Armstrong states that the Subject Property is designated “Neighbourhoods” in the OP which are considered physically stable areas made

up of residential uses in lower scale buildings, such as walk-up apartments that are no higher than four storeys.

[54] Mr. Armstrong opined that since the proposed use is permitted in the “Neighbourhoods” OP designation of the Subject Property there is no land use compatibility concern.

[55] Mr. Armstrong stated that the OP indicates that the City should make efficient use of its housing resources to meet the needs of our most vulnerable populations. He continued that s. 3.2.1.1 directs that a full range of housing be located across the City within neighbourhoods and that the OP clarifies that a full range of housing includes supportive housing for homeless people.

[56] Mr. Armstrong reviewed the OP which directs that this full range of housing will be encouraged through intensification and infill development. He noted that the OP encourages this housing through working with other levels of government.

[57] Mr. Armstrong provided his opinion that policy 3.2.1.1 of the OP clarifies that there is no compatibility concern in placing housing for people experiencing homelessness in neighbourhoods across the city in a variety of housing forms, including this proposed apartment building. Further, he opined that, by clarifying in policy 3.2.1.2 that this is encouraged to be achieved via infill intensification, there is no compatibility concern with developing housing for people experiencing homelessness via infill development.

[58] Mr. Manett advised the Tribunal that he does not dispute Mr. Armstrong’s evidence with respect to the need for the proposed housing and that he is in agreement with Mr. Armstrong’s opinion that the built form resulting from the ZBA is not at issue. Mr. Manett confirmed that he is in agreement with Mr. Armstrong’s opinion that the built form proposed is compatible with Willowdale Manor.

[59] There was disagreement between the experts with respect to the OP policies which should be applied to evaluate the proposed ZBA. Mr. Armstrong opined that the proposal should be evaluated in accordance with s. 4.1.9 of the OP, while Mr. Manett opined that the proposal should be evaluated in accordance with s. 4.1.11 and s. 4.2.3 of the OP.

[60] Mr. Manett evaluated the proposed walk-up apartment building on the basis of policies 4.1.11 and 4.2 of the OP. He described that s. 4.1.11 of the OP states that where development is proposed on a site with an existing apartment building in “Neighbourhoods”, the new development must be grade-related and must also meet the criteria regarding infill development in “Apartment Neighbourhoods”. It is Mr. Manett’s opinion that the Proposed Development does not meet the infill criteria for “Apartment Neighbourhoods” found in s. 4.2.3 of the OP.

[61] Mr. Armstrong took the Tribunal through his interpretation of s. 4.1.1 of the OP which indicates that “Neighbourhoods” contain interspersed walk-up apartments that are no higher than four storeys. He indicated that s. 4.1.4 of the OP goes on to say that Apartment buildings legally constructed prior to the approval date of this OP are permitted in “Neighbourhoods”. In Mr. Armstrong’s opinion, the OP is making a distinction between permitted low-rise walk-up apartments and apartment buildings (the tall kind) that already exist. In Mr. Armstrong’s interpretation of the policy, the OP is not stating that walk-up apartments are permitted in s. 4.1.1 and then contradicting this by stating that s. 4.1.4 that walk-up apartments are only permitted if they already exist. It is Mr. Armstrong’s opinion that s. 4.1.4 clearly is referencing legally existing “tall” apartment buildings which would then logically lead the reviewer to look at the “Apartment Neighbourhoods” policies of the OP. In this case, given that the existing building is less than 4 storeys and is a permitted walk-up apartment as per the plan (less than 4 storeys in a Neighbourhood), then it is his opinion that s. 4.1.11 does not apply. He stated that it would apply if Willowdale Manor were a 10-storey apartment building in a Neighbourhood that pre-dated the approval of the OP. Willowdale

Manor is not a 10-storey apartment building, therefore, it is Mr. Armstrong's opinion that the policies of the "Apartment Neighbourhoods", including s. 4.2.2 and 4.2.3 of the OP, do not apply to this ZBA.

[62] Under cross-examination, Mr. Manett agreed that Willowdale Manor is a walk-up apartment and that the proposed building is a walk-up apartment. Mr. Manett also agreed, with reference to policy s. 4.1.4, which states, "Apartment buildings legally constructed prior to the approval date of this Official Plan are permitted in Neighbourhoods," that there are 10-12-storey apartments in Neighbourhoods that predate the OP, and that this policy did not include the words "walk-up" before "apartment buildings," unlike the language of policy s. 4.1.1 which does include that language.

[63] Based on the agreed evidence that both the existing and proposed buildings are walk-up apartments, the Tribunal accepts and prefers the evidence of the City's Planner, Mr. Armstrong that the evaluative criteria applicable to the proposed ZBA are those listed in s. 4.1.9 of the OP.

[64] Mr. Armstrong reviewed his evidence and opined that the height, scale, massing, building orientation, siting, setbacks, Floor Space Index ("FSI") and density of the proposed building are appropriate and compatible with their surroundings, and that there will be adequate light, sky view and privacy for the residents of the existing and proposed buildings.

[65] Mr. Armstrong concluded that the ZBA proposes development which is compatible with the existing Willowdale Manor. He opined that because the site is designated "Neighbourhoods" and the proposed use is a "walk-up" apartment building which is permitted in this designation and no land use designation change is required, there is no land use compatibility concern.

CONFORMITY ISSUE

[66] One issue was identified by the Appellants and Non-Appellant Party,

- 1) Is the proposal compatible with the existing Willowdale Manor?

[67] In paragraph 49 of Mr. Manett's Witness Statement, he provides his opinion that,

The approval of Modular Transitional Housing to the site, without limitation to senior focused units, would fundamentally change the character of the property and the immediate surrounding area with the potential of introducing negative elements into this community. This is undesirable for the existing community and the future residents of the proposed community.

[68] In paragraphs 53 and 54 of Mr. Manett's Witness Statement he provides his conclusion,

It is my opinion that the proposed development, as currently proposed, is not appropriate for the subject site as is not compatible with the existing Willowdale Manor. The current use on the site. Therefore, the Zoning By-law Amendment does not represent good planning and should not be approved. However, should the tribunal determine that additional development can be supported on the subject property in the form of Modular Transitional Housing, the future use should be limited to Senior's housing to ensure compatibility and integration with the site-specific community.

[69] Mr. Manett's recommendation was to add the three words "for senior citizens" to site specific provision (C) of the ZBA which is applicable to Area A. The three additional words are underlined below,

(C) An apartment building for senior citizens is permitted with a maximum density of 126 units/hectare;

[70] Under cross-examination Mr. Manett agreed that there is "no evidence to suggest that senior residents cannot co-exist with non-senior residents."

[71] Mr. Armstrong stated that the reference to “senior citizens” in provision (R) of the ZBA with respect to Willowdale Manor is a legacy reference within the existing ZBL and is not defined in the zoning by-law. Mr. Armstrong explained that City staff did not consult on any changes to the existing zoning in terms of use, and it would have been improper to make that amendment without going through the Planning Act process of consultation. He indicated that staff didn’t want to touch the zoning for the existing building that was not proposed to change.

[72] The Tribunal heard legal argument from both Counsels with respect to whether restricting the occupancy in the ZBA to senior citizens is consistent with the PPS.

[73] The PPS in “4.0 Implementation and Interpretation” states that,

4.4 This Provincial Policy Statement shall be implemented in a manner that is consistent with *Ontario Human Rights Code* and the *Canadian Charter of Rights and Freedoms*.

[74] Laura Bisset, Counsel for the City, directed the Tribunal to *LPAT [2010] O.M.B.D. No. 666, 64 O.M.B.R. 283, Kitchener (City) Official Plan Amendment No. 58*, which she submits is the post-*Charter*, post-*Human Rights Code* version of *R. v. Bell* in the Tribunal context.

[75] Ms. Bisset referenced the submissions in the *Kitchener (City) Official Plan Amendment No. 58* decision with respect to the *Human Rights Code* and the *Canadian Charter of Rights and Freedoms* (“*Charter*”). The Tribunal summarized the law on page eight of the Decision,

3.2 The Human Rights Framework

ACTO and the Ontario Human Rights Commission cited the Ontario Human Rights Code (the “Code”) and Canadian Charter of Rights and Freedoms (the “Charter”). The Code addresses discrimination based on “disability”, and discrimination in accommodation based on “receipt of public assistance”; but it also has another clause for disputed measures which are nonetheless “reasonable and bona fide in the circumstances” (e.g., reasonably necessary to achieve legitimate objectives, and there were no other, less discriminatory means, or no accommodation possible, short of undue hardship):

1. Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or disability.
2. Every person has a right to equal treatment with respect to the occupancy of accommodation, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status, disability or the receipt of public assistance.
- 11(1) A right of a person... is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where, (a) the requirement, qualification or factor is reasonable and bona fide in the circumstances...
- 11(2) ... A court shall not find that a requirement, qualification or factor is reasonable and bona fide in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs...

The Charter covers similar ground, with a general principle at s.15(1), and another provision for "reasonable limits" at s.1:

15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[76] Eric Gillespie, Counsel for the Appellants, argued that with respect to the continuation of the existing reference in the ZBL of housing for senior citizens there is no legal non-conformity or "Clergy Principle" with respect to the *Human Rights Code* and the *Charter*.

[77] Ms. Bissett submits that housing for senior citizen housing is permitted where it is intended to ameliorate the circumstances of an equity-seeking group or where a specific legislative exception exists. She contended that the issue of whether seniors are an equity-

seeking group in need of special housing is not before the Tribunal. When Willowdale Manor was zoned, it contained a restriction limiting the population to senior citizens. Were that by-law to have been appealed, the debate would have been about whether it was permissible to limit *that* population to seniors. There would have to be evidence demonstrating that age discrimination was appropriate in those circumstances. She concludes, although those regulations have been brought forward into the amending by-law, there is no debate about whether that restriction is appropriate.

[78] The Tribunal is in agreement with Ms. Bissett that the question of “whether seniors are an equity-seeking group in need of special housing” is not before the Tribunal for consideration.

[79] Mr. Gillespie argued with respect to the proposed age restriction suggested by Mr. Manett for inclusion in the proposed ZBA, that distinctions based on age have repeatedly been found not to be discrimination. He provided examples of age restrictions found not to be discrimination related to drivers’ licenses, liquor purchasing, retirement age (*McKinney v. University of Guelph*, 1990, SCJ No. 122 QL, age related to pension benefits (*Withler v. Canada, Attorney General*, 2011 S.C.J. No 12 QL) and age related to government benefits (*Gosselin v. Quebec Attorney General*, 2002 S.C.J. No. 85 QL).

[80] Ms. Bissett summarizes that regulating the user of the land or regulating based on concerns about who the occupants are or will be, constitutes people zoning and is illegal, absent a specific legislative exception.

[81] Ms. Bissett argues that if the Tribunal approved the wording suggested by the Appellants then homeless people would be restricted by age of occupying the building proposed to be implemented by the ZBA. In her submission, this is not an outcome that is in keeping with the provincial planning policy framework, which is not in dispute; nor is it a legal outcome.

[82] The Tribunal agrees with the City that adding wording “for senior citizens” to the ZBA would unreasonably limit the occupancy of accommodation of the proposed building based on age which is not consistent with the PPS.

ZBA

[83] Mr. Armstrong took the Tribunal through a detailed analysis of the ZBA. He advised that both the parent zoning label RM in City of Toronto Zoning by-law 569-2013 and the label RM(3) in the former City of North York Zoning by-law permit apartment buildings on site and in accordance with the zoning definitions, the proposed building is an apartment building,

Apartment Building, which is defined as “a building that has five or more dwelling units, with at least one dwelling unit entirely or partially above another, and each dwelling unit has a separate entrance directly from outside or through a common inside area.”

Residential Care Home, which is defined as “supervised living accommodation that may include associated support services, and (D) an apartment building used for the purpose of supportive housing or social housing is not a residential care home”.

[84] Mr. Armstrong reviewed the site-specific provision in the ZBA as they relate to the proposal as follows:

The RM zone applicable to the site permits a maximum 12.0 metre building height (4 storeys), while the proposed ZBA reduces this maximum height for Area A by 0.5 metres to 11.5 metres (3 storeys). This is one storey less than the existing 4 storey Willow Manor apartment building on site. In my opinion this height limit conforms with policies of 4.1.9 in the Official Plan and will result in a building that is height-compatible in its context.

I reviewed the context for the minimum front yard setback. For properties directly opposite the site, the zoning by-law 569-2013 requires a minimum front yard setback between 6.05 metres and 12 metres. For some lots on the north side of Cummer Avenue, the zoning by-law requires a minimum setback of 18 metres. Regulation 10.5.40.70(1) requires a minimum setback that is the average of the setbacks of adjacent properties. This regulates the majority of lots in the vicinity. Lots abutting the subject site include 949 Willowdale Avenue which has a setback of 7.49 metres, 951 Willowdale Avenue, which has a setback of 8.99 metres, and 953 Willowdale Avenue, which has a setback of 8.52 metres. Properties along the south side of Cummer Avenue to the west of the site have setbacks of

approximately 7 metres. Other properties in close proximity to the site have smaller setbacks, such as 12 Derwent Court (3.52 metres) and 973 Willowdale (5.38 metres). The proposed building has a minimum required setback of 6 metres. The setback required in the ZBA is 6 metres, which is larger than some setbacks nearby, similar to those for properties on the south side of Cummer Avenue to the west, and well within the range of setbacks on properties in the area.

The proposed building and Willowdale Manor together will result in a FSI of 0.88. The ZBA would permit a maximum FSI of 1.0 for the Subject Property. The maximum FSI at 205 Cummer Avenue is 1.5.

The proposed zoning by-law sets a minimum front yard setback of 6 metres, and a minimum side yard setback of 10 metres from the east side yard, and 8 metres from the west side yard. The proposed side yard setbacks are reasonable for the proposed development. It is my opinion that the proposed front yard setback is proportionate to those permitted by the zoning for adjacent properties, while taking into account the existing form of development on site. The proposed setbacks conform with the Official Plan, including policy 4.1.9.b. and are reasonable and compatible.

In terms of addressing privacy and sunlight concerns, the ZBA requires a minimum separation distance of 20 metres between the proposed apartment building and Willowdale Manor. This minimum separation is much larger than the 11 metres required in the RM zone of zoning by-law 569-2013. The minimum 11 metre separation distance in the RM zone helps ensure privacy and access to light and air for residents. The proposed minimum 20 metre separation distance in the ZBA exceeds this minimum and, in my opinion, results in better privacy, sunlight and air access conditions than the ZBL.

[85] Mr. Armstrong concluded that in his opinion the ZBA includes appropriate maximum heights, minimum setbacks, separation distances, and densities to ensure that the proposed building will be compatible as infill development on the existing site, compatible with adjacent residential properties and represents good planning.

LANDSCAPED OPEN SPACE

[86] Mr. Manett referenced the website for Willowdale Manor to explain that support services are provided to tenants who are 59 years of age or older and meet the program eligibility criteria. He added that these services include personal care, medication reminders, meal preparation, security checks, light homemaking, laundry assistance and wellness/health promotion activities. He confirmed that in Willowdale Manor rent is geared to income.

[87] Mr. Manett advised that Willowdale Manor contains meeting spaces/rooms, exercise areas with exercise equipment, a lending library, reading areas and indoor areas where residents maintain plants. Mr. Manett took the Tribunal to aerial photos and photographs included in his Visual Evidence marked as **Exhibit 10** which showed the Subject Property as well as the outdoor gardens and seating areas located to the rear of Willowdale Manor.

[88] It was Mr. Manett's evidence that the proposal would result in a significant loss of the landscaped open space and outdoor amenity area currently enjoyed by Willowdale Manor residents. Mr. Manett calculated that based on the 3,749.51 m² area of the Proposed Development and the total site area of 21,187.13m², almost 18% of the existing Willowdale Manor property accessible open space would be removed. Mr. Manett stated that the residents of Willowdale Manor are seniors and do not all have the ability to access parks and trails further away. He noted that some of the residents have physical disabilities and use wheelchairs.

[89] Mr. Manett stated that Willowdale Manor has a generous landscaped area located at the front of the property which is used as amenity space for residents and visitors. The removal of this open space amenity area that has been a landscaped front yard with no planned replacement will create an overdevelopment of the Subject Property in his opinion.

[90] Mr. Manett stated that the area proposed for development is not surplus, unneeded or underutilized land that is vacant. He continued that it is an outdoor amenity area that is actively used by the existing residential rental community who live in Willowdale Manor.

[91] Mr. Manett explained that the proposed development will remove a treed landscape area, limit the pedestrian access for the existing residents of Willowdale Manor and remove an important area used for walking, Tai Chi and other organized outdoor exercise activities.

[92] Mr. Armstrong stated that Willowdale Manor is set back from Cummer Avenue by approximately 50 m. The area between the existing apartment building and Cummer Avenue is occupied by a driveway/pick-up and drop-off loop, a lawn and a variety of trees.

[93] Mr. Armstrong confirmed that the front lawn open space area proposed for development:

- Is not a municipal park,
- Is not designated by the OP as park or open space,
- Is not zoned by the ZBL as park or open space,
- Is not required to meet the current zoning requirements for amenity area or landscaped open space, and
- Site specific provisions are not required to implement the proposed development to reduce the amenity area or landscaped open space zoning regulations. The Proposed Development is in compliance with the amenity area and landscape open space zoning regulations.

[94] Mr. Armstrong stated that a portion of Area A within the ZBA will remain as landscaped amenity space for the residents of Willowdale Manor to continue to use and enjoy.

[95] It was Mr. Armstrong's evidence that the walkways currently used by Willowdale Manor residents to access Willowdale Avenue and Cummer Avenue will be maintained on-site to ensure that there will be no interference with the existing residents' access through this part of the property.

[96] Mr. Armstrong identified the Newtonbrook Park trail located to the south of the Subject Property which is accessed from Willowdale Avenue due to the change in grade at the back of the Subject Property.

[97] Mr. Armstrong identified that the Goulding Park and Mitchell Field community centres are located within the surrounding community and the North York Central public library is approximately 2.25 kilometres from the site.

[98] Mr. Armstrong explained the City's requirements for Tree Preservation and Landscape Plans (**Exhibit 1** – Joint Document Book - Volume II, pages 30 to 33) which include replacement plantings for trees requiring removal to accommodate the proposed development and that the proposal had been revised to retain an additional tree.

[99] The Tribunal agrees with and accepts the evidence of Mr. Armstrong, that while there will be a reduction in the amount of open space amenity area on the Subject Property resulting from the Proposed Development, the existing and proposed development will remain in compliance with the zoning ensuring that adequate open space amenity area is provided for all residents and visitors.

PARKING

[100] Mr. Armstrong advised the Tribunal that Willowdale Manor (175 Cummer Avenue) with approximately 600 residents and Cummer Lodge, a long-term care facility (205 Cummer Avenue) with approximately 391 residents are located on separate parcels but share vehicular parking. The existing number of parking spaces will be maintained on these properties.

[101] Mr. Armstrong explained that the ZBL would require six parking spaces for the maximum 60 units in the proposed apartment building.

[102] Mr. Armstrong indicated that the ZBA as adopted by City Council required that no new parking spaces be provided for the new apartment building. The ZBA did include a

continuation of the minimum 58 parking spaces required for 175 Cummer Avenue. He advised that the current parking spaces are intended to be shared in a campus setting.

[103] Mr. Armstrong noted that the ZBA includes the accommodation of bicycle parking for the proposal.

[104] Mr. Armstrong stated that the Proposed Development will maintain the current walkways providing pedestrian access to bus stops located on Cummer Avenue and Willowdale Avenue.

[105] Mr. Armstrong stated that the bus stop for the Cummer route provides a connection to the Finch subway station. In addition, the bus stop for the Willowdale-Senlac route provides bus service to the Sheppard subway station and the Sheppard subway line.

[106] Mr. Armstrong provided evidence that varied retail and services along Yonge Street, including pharmacies, cafes and banks, are less than a 10-minute walk away, with a major grocery store and several smaller food stores less than a 20-minute walk away.

[107] Mr. Armstrong explained that parking will be dealt with by the TCHC through the Site Plan application, which is not before the Tribunal for adjudication.

[108] As Mr. Armstrong was presenting his *viva voce* evidence, he referenced a parking study prepared by the City in support of a Site Plan application for the Subject Property. The Site Plan application had been submitted but had not been appealed and was not before the Tribunal for consideration. The Tribunal then heard an objection from Mr. Gillespie stating that there had been no disclosure or exchange by the City of a parking study, which in his view contravened the OLT Rules and the Procedural Order approved by the Tribunal for the hearing. Mr. Gillespie indicated that if the Tribunal allowed the parking study to be entered into evidence, he would request an adjournment to allow for his review of the parking study

and time for his clients to prepare their own parking study or arrange to call evidence from a parking expert. The Tribunal also heard submissions from Counsel for the City who acknowledged that the parking study had not been disclosed or exchanged with the Parties through the pre-hearing process. The Tribunal determined that the City's parking study could not properly be entered into evidence. The Tribunal did offer the City an opportunity to request an adjournment of the hearing if they felt that there would be significant prejudice to their client based on the Tribunal's ruling in order to provide time for a proper exchange of the parking study. Counsel for the City did not request an adjournment and the hearing proceeded.

[109] With respect to parking, paragraph 22 of Mr. Manett's Witness Statement states that as the Willowdale Manor residents understood the proposal,

An existing parking situation, already at stress levels for tenants and visitors, would be further affected negatively by the additional 59 proposed dwelling units with little if any provision for parking, especially for visitors.

[110] In paragraph 47 of Mr. Manett's Witness Statement he states that,

The proposed development is planning to use the existing parking areas on the site, which are already insufficient for the current uses. The current lack of parking combined with the loss of open space will negatively impact on the current residents and users of the existing building on the Site.

[111] Mr. Manett in his *viva voce* evidence readily stated that he is not a parking expert and does not prepare parking studies. Mr. Manett did state that as a Planner he regularly is involved in retaining parking experts as part of a project team to provide this expertise.

[112] The Appellants did not provide a parking study, evidence nor expert parking opinion to address their one issue, "Is the proposal compatible with the existing Willowdale Manor?"

[113] The Tribunal is not persuaded by speculation related to a potential parking issue in the absence of any expert opinion evidence being provided to substantiate the compatibility issue raised by the Appellants.

ANALYSIS AND FINDINGS

[114] The lone issue raised by the Appellants in this hearing is whether the Proposed Development is compatible with Willowdale Manor. Counsel for the City took the Tribunal to *Motisi v. Bernardi*, 1987 Carswell Ont 3719, (1987) OMBD No. 2, 20 OMBR 129,

Being compatible with is not the same thing as being the same as. Being compatible with is not even the same thing as being similar to. Being similar to implies having a resemblance to another thing; they are like one another, but not completely identical. Being compatible with implies nothing more than being capable of existing together in harmony.

[115] Counsel for the City also took the Tribunal to *Oliver v. Bluewater*, 2021 canlii125763 (November 2021) at paragraph 40 finding that; “Compatibility does not mean the same as or similar to. All that is necessary is that this development can coexist with the existing developments in the area without any adverse effect.”

[116] Counsel for the City submitted that compatible means capable of existing in harmony. She submitted that existence in harmony is measured in adverse impacts that cannot be mitigated. She continued that where adverse impacts of a proposal on its surroundings cannot be mitigated, the proposal is incompatible.

[117] The Tribunal finds that the Appellants did not proffer evidence to support their issue that the ZBA would result in development that is incompatible with Willowdale Manor.

[118] The suggestion by Mr. Mannet that a restriction be included in the ZBA related to who may occupy the proposed building based on the occupant’s age may appear neutral on it’s face, however, would in fact result in treatment which is not equal with respect to the

occupancy of accommodation inconsistent with s. 4.4 of the PPS. The Tribunal finds that the suggested wording to limit the occupancy of the proposed building to senior citizens in the ZBA is not consistent with the PPS.

[119] The Tribunal convened a hearing *de novo* within the context of s. 2.1 (1) of the Act where the Tribunal shall have regard to any decision made by a municipal council and any information and material considered by a council in making the decision.

[120] The Tribunal prefers the land use planning, urban design and opinion evidence provided by Matt Armstrong on behalf of the City for the reasons referenced above.

[121] The Tribunal finds that the land use planning evidence and opinion provided by the Appellants and Non-Appellant Parties did not disclose any land use planning basis upon which the Tribunal could support the position that the proposed ZBA would permit a development which is incompatible with Willowdale Manor.

[122] The Tribunal finds that the land use planning evidence and opinion provided in support of the appeal did not disclose any land use planning rationale upon which the Tribunal could support the position that the proposed ZBA was not in conformity with the OP.

[123] Upon the evidence, the Tribunal finds that the ZBA has had regard to matters of provincial interest as set out in s. 2 of the Act, is consistent with the PPS, conforms to the GP and the OP. The Tribunal finds that the ZBA will implement compatible development which represents good planning and is in the public interest.

ORDER

[124] **THE TRIBUNAL ORDERS** that the appeals against By-law 818-2022 of the City of Toronto are dismissed.

“Astrid J. Clos”

ASTRID J. CLOS
MEMBER

Ontario Land Tribunal

Website: www.olt.gov.on.ca Telephone: 416-212-6349 Toll Free: 1-866-448-2248

The Conservation Review Board, the Environmental Review Tribunal, the Local Planning Appeal Tribunal and the Mining and Lands Tribunal are amalgamated and continued as the Ontario Land Tribunal (“Tribunal”). Any reference to the preceding tribunals or the former Ontario Municipal Board is deemed to be a reference to the Tribunal.