

**Ontario Land Tribunal**  
Tribunal ontarien de l'aménagement  
du territoire



**ISSUE DATE:** January 19, 2024

**CASE NO(S).:**

OLT-23-000682

**PROCEEDING COMMENCED UNDER** subsection 29(11) of the *Ontario Heritage Act*, R.S.O. 1990, c. O.18

Appellant:	Bayview Woods Neighbourhood Association
Subject:	Heritage by-law to designate subject property
Description:	To designate the property as a property of cultural heritage value or interest
Reference Number:	By-law 438-2023
Property Address:	3377 Bayview Avenue
Municipality/UT:	Toronto/Toronto
OLT Case No.:	OLT-23-000682
OLT Lead Case No.:	OLT-23-000682
OLT Case Name:	Bayview Woods Neighbourhood Association v. Toronto (City)

**PROCEEDING COMMENCED UNDER** subsection 19(1)(b) of the *Ontario Land Tribunal Act, 2021*, S.O. 2021, c.4, Sched. 6

Moving Party:	Markee Developments Inc.
Purpose of Motion:	Request for an Order Dismissing the Appeal

**Heard:** July 20, 2023 by Video Hearing

**APPEARANCES:**

**Parties**

**Counsel**

Bayview Woods Neighbourhood Association ("BWNA")

A. Heisey

City of Toronto ("City")

J. Braun

Markee Developments Inc.  
("Applicant" or "Markee")

D. Bronskill

**MEMORANDUM OF ORAL DECISION DELIVERED BY WILLIAM MIDDLETON, P.  
TOMILIN AND KURTIS SMITH ON JULY 20, 2023 AND ORDER OF THE TRIBUNAL**

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**PART 1 - INTRODUCTION**

[1] This matter concerned a motion by the Applicant to dismiss ("Motion") the appeal from Heritage Designation By-law 438-2023 ("By-law") commenced by BWNA on July 13, 2023 ("OHA Appeal") pursuant to subsection 29(11) of the *Ontario Heritage Act*, R.S.O. 1990, c. O.18 ("OHA"). The Motion was heard on July 20, 2023.

[2] By oral ruling made on July 20, 2023, this Tribunal granted the Motion and Ordered that the OHA Appeal be dismissed for the reasons that follow below in Part 2.

[3] The materials before the Tribunal in respect of the Motion were:

- (a) Notice of Motion to Dismiss, dated July 17, 2023, comprising 14 pages;
- (b) Affidavit of Rochelle Vasquez, sworn July 17, 2023, comprising 366 pages;
- (c) Book of Authorities of the Applicant, comprising 150 pages;
- (d) Motion Response Record of BWNA, comprising 271 pages;
- (e) Supplementary Affidavit of Christopher Borgal, dated July 20, 2023, comprising two pages; and
- (f) Case Book of BWNA, comprising 80 pages.

**PART 2 - ISSUES AND ANALYSIS**

**History of Related Proceedings: Adjournments Repeatedly Sought**

[4] The Motion raises novel matters concerning which none of the Parties could find any prior 'on point' jurisprudence of the Tribunal, or of any Ontario court. Firstly, there

appears to be no previous case where an entity in effect sponsoring a Heritage Designation By-law that is eventually enacted by a municipality then appeals that very same by-law (let alone on the last available day for doing so). Secondly, there appears to be no previous case where a motion to dismiss such an appeal has been brought under subsection 29 (16)(a)(ii) of the OHA.

[5] It is important to note the unusual context for both the OHA Appeal and the Motion. There was a related proceeding before the Tribunal in OLT-22-002710, which was scheduled for an imminent hearing. This matter involved a settlement of a planning dispute reached on March 29, 2023 between the Applicant and the City, but nonetheless was contested by BWNA, which is a neighbourhood association of homeowners near the Applicant's proposed development located at 3377 Bayview Avenue ("Site") in the City ("Development").

[6] To facilitate the Development, the Applicant sought an official plan amendment and a zoning by-law amendment (collectively, "Planning Applications") to permit 15 mixed-use buildings on the Site that would range in height from five to eight-storeys, and up to 12 to 20-storeys. In total, 1,504 residential dwelling units were proposed under the Development, of which 50% would be affordable rental and 50% market rental.

[7] As noted, the Applicant and the City resolved all issues related to the Planning Applications, but the BWNA – which through counsel, suggests that it does 'not oppose development' – nonetheless contested that settlement.

[8] The Planning Applications matter had an interesting history before this Tribunal. This Motion hearing occurred just prior to the commencement of a long-scheduled merits hearing to consider the Planning Applications, the settlement of which was opposed only by BWNA. The hearing date of July 10, 2023 was established by Order of the Tribunal issued almost one year earlier, on July 20, 2022. Over the objections of the Applicant (the City took no position), on April 24, 2023, BWNA sought to adjourn the

hearing. Its adjournment motion was heard and denied by the Tribunal on June 1, 2023 and its Decision was issued June 7, 2023. In that Decision, Member Hardy stated:

[25] In this Motion before the Tribunal, the decision turns on prejudice and the Tribunal finds that BWNA has had reasonable time to conduct further review and similarly continues to have sufficient time to compile all of its evidence in time to proceed to the hearing as scheduled. BWNA did not proffer any evidence that would satisfy the Tribunal that prejudice would be suffered by BWNA if the hearing proceeded as scheduled.

[26] BWNA's request of the Tribunal, if granted, would effectively be frustrating a settlement reached between the statutory Parties. The Tribunal has always encouraged Parties to engage in productive discussions leading up to a hearing event in an effort to facilitate Parties reaching agreement on some or all of the outstanding issues. Providing there is no demonstrable prejudice to any Parties, the Tribunal will not stand in the way of such discussions. The Tribunal does not have any evidence before it demonstrating that BWNA or any other Party or Participant will suffer prejudice if the hearing takes place as scheduled...

[28] Based on the above, the Tribunal finds that the reasons advanced by BWNA in support of the Motion to Adjourn do not rise to the standard required to alter hearing dates that have been fixed. The Tribunal finds that granting the Motion to Adjourn in the absence of substantive reasons represents an unreasonable delay and does not represent a judicious use of the Tribunal's calendar, which is a public resource.

[above emphasis added]

[9] Despite the Tribunal's June 1<sup>st</sup> ruling, there was a subsequent effort to adjourn the July 20<sup>th</sup> hearing – on July 17, 2023, following a late adjournment request made on July 14, 2023. The adjournment request was essentially made jointly by the Applicant, the City and 'not opposed by' BWNA. The former Party, the Toronto Region Conservation Authority ("TRCA"), took no position, and, in light of the settlement reached between the City and the Applicant, also requested to be released from this proceeding – the Tribunal agreed to that request.

[10] The reason for the July 14 / July 17 adjournment request was that the OHA Appeal was suddenly delivered by BWNA on July 12, 2023, the last permissible day for doing so.

[11] The Appellant and the City took the position that the OHA Appeal must be dealt with prior to the commencement of the already scheduled merit hearing dealing with the Appellant's development proposals. Counsel for BWNA also agreed. The Applicant then immediately filed the Motion at issue in this proceeding. This Tribunal orally ruled on July 17, 2023 (in a Decision issued on July 25, 2023) that in light of these events, BWNA's late breaking OHA Appeal had now effectively secured the adjournment of the Planning Applications 'settlement hearing' despite BWNA having been unsuccessful in seeking that same relief before the Tribunal on June 1, 2023. Of course, counsel for BWNA submitted that this outcome was not his client's intention. In its Decision, this Tribunal stated:

[6] The Tribunal communicated its concern that this long-scheduled hearing was not going to proceed and that, inevitably, valuable hearing days would be lost. Reluctantly, in the interests of procedural fairness, the Tribunal nonetheless granted the adjournment at least until the Appellant's motion to dismiss the OHA Appeal ("Motion to Dismiss") is heard. The Parties were not able to proceed with that motion on July 17<sup>th</sup>, as not all contemplated materials had been filed...

[7] After hearing submissions from the Parties, and in the interests of expediting this matter so that further hearing days would not be lost, the Tribunal directed that the Appellant's Motion to Dismiss (case number OLT-23-000682) be argued on **Thursday, July 20, 2023**, commencing at **1 p.m.**

### **The Unusual Circumstances of the OHA Appeal**

[12] As noted above in paragraph [10], the BWNA initiated the OHA Appeal on the very last permissible day for doing so: July 12, 2023. The evidence on this Motion clearly established that this Motion came as a complete surprise to both the City and the Applicant – and perhaps to the TRCA as well, which is no longer a Party in this proceeding.

[13] The reason why BWNA's sudden last-minute OHA Appeal caused dismay is evident: BWNA was essentially the 'sponsor' of the very same By-law that is the subject of its OHA Appeal.

[14] At all material times, the BWNA drove the process under the OHA and strongly supported the development and enactment of the By-law. In the Tribunal's view, the evidence filed on the Motion established that:

- (a) The BWNA, along with other local neighbourhood associations and bodies, sponsored and wholeheartedly supported the designation of the Site as one of heritage value, beginning in March 28, 2022, subsequent to the Planning Applications made by Markee in June 2021;
- (b) The BWNA emphatically endorsed the heritage by-law process on numerous occasions in 2022 and 2023 relating to the heritage designation of the Site and retained experienced legal counsel together with experts and lay consultants to advise it throughout that period. The City expended considerable resources and time – all taxpayer funded – to implement that by-law process triggered by BWNA, the known and expected outcome of which was the passing of the By-law in May 2023;
- (c) Clearly, the BWNA knew that the heritage designation process was likely to have a considerable impact on Markee's Development and used that mechanism to further its objective of either opposing or limiting that project;
- (d) The leaders of the BWNA were instrumental participants in the heritage designation process and supported the recommendation to City Council to develop and pass the By-law. They also had numerous opportunities to consult with their team of experts and counsel to review and analyse the basis for that By-law, including all view-scape matters relating to the intended heritage attributes, which were consistently and clearly described throughout and became part of the By-law;
- (e) The BWNA as an active promoter of the heritage designation knew or ought to have known that it should have made clear to the City any

questions, perceptions, assumptions or objections it had regarding the impending heritage attributes set out in the By-law which had been clear for many months in 2023 leading up to the passing of the By-law in May, 2023. However, BWNA communicated no such concerns or questions to the City and continued to endorse and express its written support for the proposed By-law;

- (f) BWNA also knew or ought to have known that it had an opportunity to consult further with the City about any questions, concerns or uncertainties that it concerning the By-law, but instead chose not to engage at all and instead filed the OHA Appeal;
- (g) Even if the BWNA somehow misunderstood the clear and specific content of the analysis in the publicly communicated intentions that led to the heritage attributes actually finalized in the By-law – *although the evidence to support this alleged misunderstanding was unconvincing* - the Tribunal is of the view that BWNA should have sought advice from its retained expert team and, from a common sense standpoint, should have engaged further with the City in relation to the By-law it had actively and repeatedly supported and pursued since it knew or ought to have known that its silence would inevitably lead the City to assume that the BWNA had no concerns, questions or issues about the proposed By-law; and
- (h) BWNA commenced its OHA Appeal on the very last day of the statutory appeal period, which was permissible, but it knew or ought to have known that this would have the effect of further delaying the long scheduled Planning Applications appeal hearing that it had already unsuccessfully sought to adjourn – in the Tribunal’s view it is immaterial that this may not have been the express and deliberate intention of BWNA or its counsel (a well-respected member of the municipal bar who has assured the Tribunal that it was not, whose assurance the Tribunal accepted).

[15] The Tribunal did not find the explanations proffered by counsel for BWNA as to why the OHA Appeal was filed at the last permissible moment to be persuasive. The main contention was that BWNA's expert only recently determined that the By-law reflected certain view-scape issues of concern, which in turn led to the need to file the OHA Appeal. This was due to some alleged confusion or misapprehension on the part of certain BWNA representatives, as summarized above in this Part 2.

[16] The statements about the alleged misapprehension were made in affidavits filed for the first time in response to the Applicant's Motion. Moreover, those affidavits contained several sections of content that were largely identical as between three different affiants. No doubt these were prepared in a late effort to counter the anticipated arguments of the Applicant to the effect that 'there was nothing new in the By-law that should have surprised BWNA' given its very long history of support for the heritage designation.

[17] Simply put, as also already noted above, the Tribunal did not find the allegations of confusion or misapprehension to be persuasive or credible, particularly in light of the long history of engagement by the BWNA with the heritage designation of the Site and the fact that the BWNA had a sophisticated supporting team of experts with whom it could easily have discussed those concerns. BWNA offered no convincing explanation as to why it never sought to have such discussions.

[18] The overwhelming inference that the Tribunal could not avoid drawing after considering the evidence filed both in support of and in response to the Motion was that the BWNA filed the OHA Appeal at the last possible moment because it had likely concluded that without mounting a challenge to the By-law, it simply had no reasonable prospect of successfully contesting the settlement reached between the City and the Applicant concerning the Development. Indeed, one day after the oral ruling made by this Tribunal granting the Motion, BWNA withdrew its Appeal concerning the settlement of the Planning Applications.



## The Applicable Tests For Dismissing the OHA Appeal

[19] The relevant provisions of the OHA are as follows:

“Tribunal” means the Ontario Land Tribunal; (“Tribunal”)

### Section 29...Appeal to Tribunal

(11) Any person who objects to the by-law may appeal to the Tribunal by giving the Tribunal and the clerk of the municipality, within 30 days after the date of publication under paragraph 4 of subsection (8), a notice of appeal setting out the objection to the by-law and the reasons in support of the objection, accompanied by the fee charged by the Tribunal. 2019, c. 9, Sched. 11, s. 7 (6); 2021, c. 4, Sched. 6, s. 74 (2).

### If notice of appeal

(13) If a notice of appeal is given within the time period specified in subsection (11), the Tribunal shall hold a hearing and, before holding the hearing, shall give notice of the hearing to such persons or bodies and in such manner as the Tribunal may determine. 2019, c. 9, Sched. 11, s. 7 (6).

### Powers of Tribunal

(15) After holding the hearing, the Tribunal shall,

- (a) dismiss the appeal; or
- (b) allow the appeal in whole or in part and,
  - (i) repeal the by-law,
  - (ii) amend the by-law in such manner as the Tribunal may determine,
  - (iii) direct the council of the municipality to repeal the by-law, or
  - (iv) direct the council of the municipality to amend the by-law in accordance with the Tribunal’s order. 2019, c. 9, Sched. 11, s. 7 (6).

**Dismissal without hearing of appeal**

(16) Despite the *Statutory Powers Procedure Act* and subsections (13) and (15), the Tribunal may, on its own motion or on the motion of any party, dismiss all or part of the appeal without holding a hearing on the appeal if,

- (a) the Tribunal is of the opinion that,
  - (i) the reasons set out in the notice of appeal do not disclose any apparent ground upon which the Tribunal could allow all or part of the appeal, or
  - (ii) the appeal is not made in good faith, is frivolous or vexatious, or is made only for the purpose of delay;
- (b) the appellant has not provided written reasons in support of the objection to the by-law;
- (c) the appellant has not paid the fee charged by the Tribunal;  
or
- (d) the appellant has not responded to a request by the Tribunal for further information within the time specified by the Tribunal. 2019, c. 9, Sched. 11, s. 7 (6); 2021, c. 4, Sched. 6, s. 74 (2).

**Representations**

(17) Before dismissing all or part of an appeal on any of the grounds mentioned in subsection (16), the Tribunal shall,

- (a) notify the appellant of the proposed dismissal; and
- (b) give the appellant an opportunity to make representations with respect to the proposed dismissal. 2019, c. 9, Sched. 11, s. 7 (6).

[above emphasis added]

[20] It is evident that the language expressed above in subsection 29(16) of the OHA with respect to the tests to be considered by the Tribunal concerning dismissals of appeals without a hearing are very similar to the provisions in subsection (19) of the *Ontario Land Tribunal Act, 2021*, S.O. 2021 c. 4, Sched. 6 (“OLTA”); Rule 15.4 of the OLT Rules of Practice and Procedure (“Rules”); in subsection 4.6(1) of the *Statutory*

*Powers Procedure Act*, R.S.O 1990, c. S.22 (“SPPA”) (incorporated in subsection 19(1) of OLTA); and also in subsection 34(25) of the *Planning Act*, R.S.O. 1990, c. P.13 (“PA”). It is therefore the Tribunal’s view that since there appear to be no decided cases under subsection 29(16) of the OHA, the Tribunal may have reference to the jurisprudence pertaining to the above-noted provisions of the OLTA, the Rules, the SPPA and the PA. Indeed, counsel for Markee in his Motion submissions made extensive reference to that caselaw.

[21] The Tribunal noted that Markee’s counsel relied only on subsection 29(16)(a)(ii) and then solely on the ground that in the circumstances of this case that BWNA’s OHA Appeal ought to be dismissed because it is ‘frivolous or vexatious’. In other words, Markee’s counsel did not contend that BWNA’s OHA Appeal was made in ‘bad faith’ or only for the purpose of delay. To the Tribunal – and perhaps also to Markee’s counsel – the last minute nature of the OHA Appeal was suggestive of an underlying ‘delay purpose’. However, counsel for BWNA is a well-regarded and experienced member of the municipal law bar, and he vigorously maintained that the filing of the OHA Appeal was not done in order to deliberately delay the adjudication of the Planning Applications settlement. The Tribunal accepted that submission.

[22] The Tribunal further agreed with the argument of the Applicant’s counsel as follows:

A potential appellant has the responsibility to participate fully and fairly in the process leading up to a Council decision opposed by the appellant. The merits of a potential Council decision should be debated in advance of the Council decision, as opposed to leaving that debate until after the Council decision...

The OHA prescribes a process for a person to object to a proposed designation through service of a notice of objection setting out the reasons for the objection and all relevant facts. This process allows a municipality to consider the objection prior to passage of the designating by-law...

The process leading to the Designating By-law was clearly open and public. The BWNA had ample opportunity to communicate any concerns, including objecting to the Statement of Significance... [in the By-law]... There can be no reasonable explanation for the failure of the BWNA to identify to City staff...[other committees dealing with the By-law] ...and/or City Council its

alleged concern with the Statement of Significance and/or the Designating By-law.

[23] Among other counterarguments, counsel for BWNA pointed out that there is no mandatory requirement for an OHA appellant to deliver an objection to a heritage by-law as a 'pre-condition' to filing an OHA Appeal – which is technically correct. He also, in essence, contended that all of the arguments made by Markee's counsel on this Motion vanish if BWNA had never participated in the processes leading up to the enactment of the By-law. Thus, he contended, 'why should the BWNA be treated differently'?

[24] In the Tribunal's view, the long factual history relating to the role played by the BWNA in its strenuous advocacy in support of the process leading up to the By-law enactment is highly germane here. Given that the BWNA had every opportunity to make any objections or confusion known to the City during the process that it actively encouraged and participated in at all material times - but chose not to do so – has lead the Tribunal to agree with the position taken by Markee that:

The Appeal is frivolous and vexatious because the BWNA did not previously take such a position, did not advise the Toronto Preservation Board, the Planning and Housing Committee or City Council of this position, and waited until after the filing of all witness statements to advise the Tribunal of its intentions... [by filing the OHA Appeal at the last available moment].

[25] The Tribunal concurs with the views expressed by Markee's counsel that the public interest context is what makes this situation so different and compelling and which has lead the Tribunal to the conclusion that the OHA Appeal is frivolous and vexatious – because it is in the public interest under the OHA that an entity in the position of the BWNA ought not be permitted to 'lay in the weeds' and never reveal its position during a process that it had very substantially fostered and participated in. The Tribunal therefore exercises its discretion to consider the totality of the conduct of the BWNA in these unique circumstances to constitute frivolous or vexatious behaviour warranting the dismissal of the OHA Appeal. In doing so, the Tribunal recognizes that these circumstances are very unique and this ruling ought not be considered to be a precedent for the proposition that a 'last-minute appeal' under the OHA creates a presumption of frivolous or vexatious conduct.

[26] As an aside, it is the Tribunal's view that it will always be difficult for a moving party to marshal clear evidence of a specific intent or a pattern of deliberate frivolous and vexatious behaviour on the part of a sophisticated litigant that is well-represented by counsel and expert consultants. Thus, it is this Tribunal's determination that it will exercise its reasonable discretion to draw inferences from all of the relevant circumstances in order to make findings, such as those described above in this Part 2. This is, of course, not to state that the result in this proceeding will dictate the same finding in a future case: because the Tribunal's rulings will always turn on the facts and circumstances of each case.

[27] As a final point, as stated in its oral ruling, the Tribunal found that the caselaw cited by both Parties was of only limited assistance. This is not a situation where the Tribunal must critically evaluate and analyze in detail the underlying 'merits' of the grounds to be relied upon by BWNA in pursuing the OHA Appeal. This is also not a case where a party had a statutory obligation to provide a 'reasonable explanation' for its conduct like so many of the PA decisions referred to by Markee's counsel. Of course, as already alluded to, there is no evidence here of vexatious conduct in the nature of 'nasty behaviour' during the conduct of a Tribunal proceeding, and thus, the cases which turned on those allegations were also of little help.

[28] The most useful – although still only marginally – jurisprudence was the case of *Fancy Dell Developments Inc. v Toronto (City)*, 2009 CarswellOnt 5880 (OMB) ("*Fancy Dell*"). One comment made by OMB Member Rossi in *Fancy Dell* is broadly germane as it captures in a very general sense the essence of the Tribunal's concern here expressed regarding the above-described actions/inactions of the BWNA:

The Board determines further that the Moving Party and the City of Toronto were entitled to know the nature of the Responding Party's objection in a timely fashion and...the obligation rests with the Responding Party to put that information to City Council before Council is called to make a decision. The Board also determines that the Responding Party had ample opportunity to identify and convey any legitimate concerns with the Moving Party's application to the City in a timely fashion in order that such concerns could be dealt with during the approval process. They chose not to do so...it is the persons and/or bodies seeking to participate who are bound to make

concerns known through an established and recognized process and the requirements for notice or appeal are markedly different... The Board was further assisted by a relevant finding in *Vavro et al. V. Dudley (2007)*, 58 O.M.B.R. 106: "The clear intent is for the merits of proposals to be debated in advance of the authorities' decision; it is not to leave that debate until afterwards.

[above emphasis added]

[29] The parallel drawn by Markee's counsel in argument, with which the Tribunal agrees, was:

For the first time, the BWNA is taking the public position that the views and vistas included in the Statement of Significance and the Designating By-law should be revised. The Appeal is frivolous and vexatious because the BWNA did not previously take such a position, did not advise the Toronto Preservation Board, the Planning and Housing Committee or City Council of this position, and waited until after the filing of all witness statements to advise the Tribunal of its intentions.

In the Tribunal's view, while the requirements under the PA noted in the case reference in paragraph [28] are not present in the OHA, the rationale mentioned by the Board there is relevant and is useful in consideration of the conduct of BWNA in all of the circumstances of this proceeding.

## **ORDER**

[30] **THE TRIBUNAL ORDERS** that:

- (a) the motion by Markee Developments Inc. to dismiss the appeal by the Bayview Woods Neighbourhood Association from Heritage Designation By-law 438-2023 commenced by on July 13, 2023 brought pursuant to

subsection 29(11) of the *Ontario Heritage Act*, R.S.O. 1990, c. O.18 is hereby allowed and that appeal is hereby dismissed;

- (b) there shall be no costs awarded in respect of the motion.

*“William Middleton”*

WILLIAM MIDDLETON  
VICE CHAIR

*“P. Tomilin”*

P. TOMILIN  
MEMBER

*“Kurtis Smith”*

KURTIS SMITH  
MEMBER

**Ontario Land Tribunal**

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