Ontario Land Tribunal
Tribunal ontarien de l'aménagement du territoire

ISSUE DATE: March 19, 2025 **CASE NO(S).:** OLT-23-000996
OLT-24-000808

PROCEEDING COMMENCED UNDER subsection 34(11) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant/Appellant:	Toronto (Bayview Car Wash) LP
Subject:	Application to amend the Zoning By-law – Refusal or neglect to make a decision
Description:	To permit the development of a 46-storey mixed use building with retail at ground level and 419 residential units
Reference Number:	23 163199 NNY 15 OZ
Property Address:	1802 Bayview Avenue
Municipality/UT:	Toronto/Toronto
OLT Case No.:	OLT-23-000996
OLT Lead Case No.:	OLT-23-000996
OLT Case Name:	Toronto (Bayview Car Wash) LP v. Toronto (City)

PROCEEDING COMMENCED UNDER subsection 114(15) of the *City of Toronto Act, 2006*, S.O. 2006, c. 11 Sched A.

Applicant/Appellant:	Toronto (Bayview Car Wash) LP
Subject:	City of Toronto Site Plan Approval
Description:	To permit the development of a 46-storey mixed use building with retail at ground level and 419 residential units
Reference Number:	23 163207 NNY 15 SA
Property Address:	1802 Bayview Avenue
Municipality/UT:	Toronto/Toronto
OLT Case No.:	OLT-23-000997
OLT Lead Case No.:	OLT-23-000996

PROCEEDING COMMENCED UNDER subsection 22(7) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant/Appellant:	Toronto (Bayview Car Wash) LP
Subject:	Request to amend the Official Plan – Refusal of request
Description:	To permit the development of a 46-storey mixed use building
Reference Number:	24 120678 NNY 15 OZ
Property Address:	1802 Bayview Avenue
Municipality/UT:	Toronto/Toronto
OLT Case No.:	OLT-24-000808
OLT Lead Case No.:	OLT-24-000808
OLT Case Name:	Toronto (Bayview Car Wash) LP v. Toronto (City)

PROCEEDING COMMENCED UNDER subsection 9(1) of the *Ontario Land Tribunal Act, 2021*, S.O. 2021, c. 4, Sched. 6

Request by:	City of Toronto
Request for:	Request for Direction

Heard: December 2, 4-12, 2024 by video hearing

APPEARANCES:

Parties	**Counsel / Representative***
Toronto (Bayview Car Wash) LP	Michael Foderick Daniel Angelucci
City of Toronto	Jessica Braun Michelle LaFortune
Metro Ontario Real Estate Limited	Conner Harris Leah Cummings (*in absentia*)
Broadway Area Residents Association	Marc Kemerer Jesper Thoft* Jim Parker* Bob Reid*

DECISION DELIVERED BY C. I. MOLINARI AND ORDER OF THE TRIBUNAL

Link to Order

INTRODUCTION

[1] In accordance with Rule 10.11 of the Tribunal's Rules of Practice and Procedure ("Rules"), the Tribunal convened a Tribunal-initiated motion hearing on the first day of the merit hearing in respect of appeals filed pursuant to ss. 22(7) and 34(11) of the *Planning Act* ("Act") by Toronto (Bayview Car Wash) LP ("Appellant") for the property known municipally as 1802 Bayview Avenue ("Property"). The appeals were filed against the refusal of an Official Plan Amendment ("OPA") application ("OPA Application") and the failure to make a decision on a Zoning By-law Amendment ("ZBA") application (together "Applications") by the City of Toronto ("City").

[2] A related Site Plan Approval ("SPA") application was appealed pursuant to s. 114(15) of the *City of Toronto Act, 2006* but was not the subject of this hearing and, as requested by Counsel for the Appellant, will be held in abeyance pending the outcome of the OPA appeal ("OPA Appeal") and ZBA appeal ("ZBA Appeal") (together "Appeals").

[3] The purpose of the Applications, as submitted, was to facilitate the proposed redevelopment of the Property with a 46-storey mixed-use building consisting of 419 residential units and retail space at ground level. The Applications were revised with an increase in the unit count to 479 and an increase in height to 156.3 metres ("m"), with a mechanical penthouse stepped back from the tower, for a total height of 163.9 m. The increase in height is due to the introduction of taller floor-to-ceiling heights on the sixth floor of the podium and the amenity floor of the tower ("Revised Proposal").

[4] Metro Ontario Real Estate Limited (“Metro”) and Broadway Area Residents Association (“BARA”) were added as Parties to the Appeals at the first Case Management Conference (“CMC”).

[5] Participants to the Appeals include EL Terra Glenavy LP, Leaside Residents Association, South Eglinton Davisville Residents Association, Toronto Standard Condo Corporation 1542, Laurie Sims, Sarah Coombs, and Mary Lou Wojick.

MOTION HEARING

[6] Counsel for the Appellant advised the Tribunal at the second CMC that the OPA Application had been expanded post-appeal (“Expanded OPA”) to include 590 to 592 Roehampton and 7 to 15 Glenavy Avenue (“Expanded Lands”) in order to assist in the transition to the west of the Property, but with no development planned for the Expanded Lands. There were no similar expansions to the ZBA or SPA applications.

[7] The Appellant attempted to expand the OPA Application to include the Expanded Lands via email to the Tribunal on June 28, 2024 (“Appellant’s Email”) (marked as Exhibit 3), being the day after the OPA Appeal was filed, but no supplementary OPA application was filed and appealed for the Expanded Lands.

[8] The Tribunal determined that it was therefore necessary to establish whether the Expanded OPA met the requirements of s. 17(50.1) of the Act, with “necessary modifications” for an OPA requested under s. 22 of the Act. In this regard, s. 17(50.1) of the Act, as so modified, expressly “does not give the Tribunal power to approve or modify any part of the [OPA as under s. 22(11) of the Act] that … (b) was not added, amended, or revoked by the [OPA as under s. 22(11) of the Act] to which the notice of appeal relates”.

[9] The Tribunal further determined that a motion hearing was required to determine the appeal status of the Expanded OPA as it includes lands that did not form part of the OPA Application as filed, was not considered by the City as part of the municipal decision for the OPA Application, and did not form part of the OPA Appeal or the Notice

of Appeal. Further, if the Expanded OPA were to be determined to be appealed, the motion hearing would still be required to determine the sufficiency of the service of notice for the OPA Appeal ("Notice"), as the Expanded Lands were not referenced in the Notice, other than in the Explanatory Note on pages 38 and 39 of 70. It is noted that the Notice area was widened to include the properties to be served with respect to the Expanded Lands.

[10] On October 30, 2024, the Tribunal thus provided notice to the Parties of the direction for the Tribunal-initiated motion hearing, given the issues of jurisdiction and notice with respect to the Expanded OPA, and requested the position of the Parties on the motion to be heard in writing and on an adjournment of the merit hearing.

[11] The Tribunal directed that the motion hearing be held on the first day of the merit hearing for the Parties to make submissions on the status of the Expanded OPA and the Notice, and the potential need for an adjournment of the merit hearing, if required.

[12] It is noted that Metro took no position on the motion and BARA agreed with the City's position on the motion.

City Submissions

[13] Acting in the role of the moving party, the City submitted that the Tribunal has no jurisdiction to consider the Expanded OPA and requested an adjournment of the merit hearing, brief or otherwise, if the Tribunal found the Expanded OPA to be properly before it, in order to allow the Parties to exchange updated materials and for the City to meet the revised case without prejudice. The City contended that the case, as currently before the Tribunal, was premised with the addition of the Expanded Lands and, if the Expanded Lands are not to form part of the OPA Appeal, revised witness statements without reference to the Expanded Lands should be required to be filed with the Tribunal.

[14] The City noted that the Appellant's Email formally advised of the expansion of the OPA application, but that no new OPA application had been filed with the City. The City

acknowledged that it had overlooked the requirements of s. 17(50.1) of the Act and had therefore not previously raised the issue.

[15] With respect to the Tribunal's jurisdiction to consider the Expanded OPA, the City submitted that a plain reading of ss. 17(50.1) and 22(11) of the Act makes clear that the Tribunal does not have jurisdiction to expand the boundaries of an OPA to include lands that were not contemplated by City Council through an application, and were not sufficiently addressed in the Notice. Further, the City contended that the boundary of the OPA was defined at the time of the appeal of the OPA application, that an expanded boundary cannot be remedied through the Notice, and that a new OPA application is required for the Expanded Lands.

[16] The City submitted that a review of the history of legislative changes to s. 17(50.1) of the Act is instructive and that, when added to the Act through Bill 51 in 2006, s. 17(50.1) of the Act clarified the powers of the Tribunal, as previously constituted, for official plan and OPA appeals. At the time, s. 17(50.1) of the Act read: "[f]or greater certainty, subsection (50) does not give the Municipal Board power to approve or modify any part of the plan that…was not dealt with in the decision of council to which the notice of appeal relates" [emphasis added]. The City submitted that the underlined wording was considered vague and interpreted broadly at the time and was subsequently revised through Bill 139 to, as it now reads: "…was not added, amended or revoked by the plan to which the notice of appeal relates" [emphasis added]. The City added that the change to the wording makes clear the limitations of the Tribunal post-Bill 139 with respect to expanding the boundaries of an OPA appeal, and submitted that the changes to the Act restrict the Tribunal's jurisdiction in this regard.

[17] The City submitted case law, both pre- and post-Bill 139, in support of the requirement for an OPA application and appeal for the Expanded Lands, and an interpretation of s. 17(50.1) and 22(11) of the Act, including, among others:

Pre-Bill 139:

- *Hobo Entrepreneurs Inc. v. Sunnidale Estates Ltd.*, 2013 ONSC 715 ("Hobo");

- *Zellers Inc., Re*, 2014 CarswellOnt 6140 (OMB) (“Zellers”); and
- *6980848 Canada Corporation v. Ottawa (City)*, 2016 CarswellOnt 9890 (OMB) (“6980848”); and

Post-Bill 139:

- *Augend189 Dundas West Village Properties Ltd. v. Mississauga (“City”)*, 2023 CanLII 21648 (ON LT) (“Augend”); and
- *Edenshaw Queen Developments Limited v. Mississauga (City)*, 2023 CanLII 36254 (ON LT) (“Edenshaw”).

[18] The City drew the Tribunal’s attention to paragraphs 8 and 9 of the Hobo decision, wherein the Ontario Superior Court of Justice addressed the elimination of the latitude the Tribunal, as previously constituted, had enjoyed prior to the addition of s. 17(50.1) of the Act through Bill 51:

> 8 Member Sutherland stated that the addition of s. 17(50.1) of the *Planning Act* eliminated the latitude the Board had earlier enjoyed. He described the impact of s. 17(50.1) as follows:
>
> > subsection 17(50.1) does not provide the Board with the power to approve or modify any part of a plan that is in effect and was not dealt with in the decision of council to which the appeal relates. This change effectively limits the Board's modification powers respecting official plan and official plan amendments, constituting a significant restriction on the Board's powers to resolve matters through such modifications.
> >
> > . . .
> >
> > Subsection 17(50) [3] is specific — the Board has no power to approve or modify any part of a plan that is in effect and was not dealt with in the decision of council to which the notice of appeal relates. It is not a matter of degree. It is not a matter of which section of the plan we are looking at. The door is not ajar; it is slammed shut. It is not a matter of being too legalistic or narrow, as Mr. Zakem suggests. The legislation says what it says and it says so 'for greater certainty.'
> >
> > [Emphasis added.]
>
> 9 In this regard, Member Sutherland quoted with approval from *Angus Glen North West Inc., Re*, [2011] O.M.B.D. No. 861 (O.M.B.) where the Board at para. 17 said of s. 17(50.1):
>
> > This is not just a friendly reminder. It is a potent injunction against the Ontario Municipal Board to open up ("approve or modify") an Official Plan or part which

> are in legal effect and outside the purview of the decision of council to which the appeal notice relates.

[19] The City referred to paragraph 22 in the Zellers decision in which the Tribunal, as previously constituted, acknowledged that the intent of the wording of s. 17(50.1) of the Act through Bill 51 was to make the Tribunal “more of a true Appellate body, to ensure that the Board would not usurp the role of the municipality as the primary decision maker and create appeals”.

[20] The City drew attention to 6980848, wherein the distinction was made that, pre-Bill 139, “[t]he Act [did] not use the words "was not changed or modified". If the intent of the Act was to always limit the Board's powers to only those sections that were changed or modified it could have specifically used those words”. As the Act was subsequently revised to echo the intent of the suggested wording, the City submitted that the Tribunal is now limited to approve or modify OPAs only if added, amended, or revoked by the OPA to which the Notice relates. Additionally, as the Notice only relates to the OPA Appeal, the Tribunal can only approve or modify the OPA as it applies to the Property, and not to the Expanded Lands.

[21] The Augend decision was cited by the City as dealing with a remarkably similar issue to what was before the Tribunal. In paragraphs [31], [32], and [35] of the decision, the Tribunal found that:

> [31] … the clause in ss. 17(50.1) which reads “to which the notice of appeal relates” is particularly instructive. The Tribunal’s jurisdiction is constrained by this statutory provision, such that the Tribunal cannot modify an appeal to include lands that were not part of the original development application nor part of the related “notice of appeal” as filed;
>
> [32] … the original notice of appeal in this instance does not “relate” to “the plan” i.e., the development application which the Applicant now seeks to put before the Tribunal. The original notice of appeal only relates to the original development application; and
>
> [35] … the proper procedure is for the Applicant/Appellant to file an appeal from the decision of Council … in respect of the revisions to the development application.

[22] The City cited the Edenshaw decision as being similar to the Augend decision in its findings that the Tribunal lacks jurisdiction to consider additional lands in accordance

with s. 17(50.1) of the Act, and that the Tribunal has been quite consistent in its findings in this regard.

[23] It was the City's contention that, based on the submitted case law, the Tribunal does not have jurisdiction to hear an appeal of the Expanded OPA as it was not included in the Notice, a new OPA application would be required, and the Appellant cannot remedy the issue through an email to the Tribunal advising of the expansion of the OPA to include the Expanded Lands.

[24] The City further submitted that a new appeal would be required for the Expanded Lands as it is not connected in any way to the OPA Appeal, was not part of the public meeting for the OPA application, the municipal circulation process to commenting departments and agencies, or the Tribunal screening process under Rule 15 of the Rules.

[25] Additionally, the City posited that, in any event, the merit hearing should be adjourned. If the Appellant were to consolidate an appeal of the Expanded OPA with the OPA Appeal, the merit hearing must be adjourned in order for a new OPA application to be filed, for it to be deemed complete by the City, and for it to subsequently be appealed. Alternatively, if the Appellant were to abandon the Expanded OPA, the City argued that the merit hearing should also be adjourned in order to provide the City time to prepare their case without the Expanded Lands as it would be highly prejudicial to the City given the interconnectedness of the OPA Appeal and the Expanded Lands, and the reliance of the witnesses on the Expanded Lands in their evidence.

[26] Regarding notice, the City submitted that any deficiency in the Notice may be moot depending on the finding related to the status of the Expanded OPA. The City left the issue of the Notice in the Tribunal's hands.

Appellant Submissions

[27] The Appellant submitted that there is no statutory impediment to the Expanded OPA appeal, but noted that, if the Tribunal would decide that it doesn't have jurisdiction, the Appellant would want to proceed with the OPA Appeal without an adjournment, reasoning that the Expanded Lands are not critical to its case.

[28] With respect to the Notice, the Appellant submitted that the appeal of the Expanded OPA was "procedurally pristine" and that it was an "off-the-wall" suggestion that, because the Expanded Lands were not referenced on the first page of the Notice, the Notice is somehow deficient. The Appellant furthered that the Explanatory Note is the most substantive part of the Notice and that it listed the addresses of the Expanded Lands, noted that no new development was proposed for the Expanded Lands and included the Expanded Lands on the attached location map. Additionally, the Notice area was widened to include the properties to be served with respect to the Expanded Lands.

[29] The Appellant proffered that no one was prejudiced with the addition of the Expanded Lands to the OPA Appeal, given that the Notice for the CMC held on October 16, 2024, for the OPA Appeal, did not result in further requests for status. Further, the Appellant submitted that no Party was caught off guard, nor did they object on a statutory basis to the Expanded Lands, all Parties were given extra time to update the Issues List, the witness statements covered the Expanded Lands in detail, and a public meeting is not a requirement for an appeal and should not be considered in the determination of the jurisdictional issue.

[30] With respect to the case law submitted by the City, the Appellant contended that they are either outdated or permit expansions to OPAs, and that there is no "silver bullet" case to form a precedent to be followed by the Tribunal.

[31] The Appellant asserted that this case is distinguishable from Augend (referred to by the Appellant as “Dundas”) in that there were procedural problems in that case, as no CMC was held related to the additional lands.

[32] The Appellant referred to the *Dufferin Mall Holdings Inc. v Toronto (City)*, 2021 CanLII 112397 (ON LT) (“Dufferin Mall”) Tribunal decision, which deals with an OPA application for a portion of a property that was expanded at the Tribunal hearing, by request of the City, to cover the entire property. It was submitted that the Dufferin Mall decision is but one of many decisions where the Tribunal has allowed expansions to OPAs following an appeal, although it was the only case cited. The Appellant furthered that the notice area was expanded in Dufferin Mall, and that such expansion was not *ultra vires* the Act.

[33] With respect to s. 17(50.1) of the Act, the Appellant submitted that making the necessary modifications, as directed by s. 22 (11), by replacing the word ‘plan’ with ‘privately initiated OPA’ in s. 17(50) and s. 17(50.1), makes plain and clear that the Tribunal can expand the lands geographically beyond the limits of a property subject to an OPA appeal. Further, the Appellant compared a geographic expansion to an OPA application to other modifications that can be, and often are, made upon settlement or approval of OPAs, such as community benefits and minimum amounts of non-residential space, positing that the statute does not mention a limitation to geographic expansions.

[34] The Appellant asserted that the City was interpreting such modifications to s. 17(50) of the Act, but not s. 17(50.1), in error of the directions set out in s. 22 (11) and that, with the necessary modifications to s. 17(50.1), no statutory issue results that precludes the Tribunal from considering the Expanded Lands as part of the OPA Appeal. Further, it was submitted that the Tribunal has allowed several geographic expansions for OPA appeals, as evidenced in the case law submitted by the City, with this being the first time it has been questioned. Precluding the Expanded Lands was characterized by the Appellant as an “absurd result”.

[35] In response to the City's claim of prejudice if the merit hearing were to be limited to the OPA Appeal and not adjourned, the Appellant noted that the planning justification report ("PJR"), and the other reports, as originally filed with the City, addressed only the OPA Appeal, and the PJR dealt with transition to neighbouring lands without the Expanded OPA. It was the Appellant's position that the witnesses would therefore be able to discern between the two and focus on the OPA Appeal, precluding any prejudice to the City.

[36] The Appellant concluded that, if the Tribunal were to find that the notice for the Expanded OPA is not in order, it would be a "very strict legal but incorrect" interpretation of s. 17(50.1) of the Act.

Findings on the Motion Hearing

[37] The Tribunal carefully considered the submissions on the jurisdictional issue and the submitted case law from both Parties and found that the Tribunal's jurisdiction is restricted based on the language in s. 17(50.1) of the Act, such that it is statute barred from considering the Expanded Lands as it did not form part of the OPA Appeal, nor was it the subject of a subsequent OPA application appealed and consolidated with the Appeals.

[38] Read in a purposive manner, the wording of s. 17(50.1) of the Act, with necessary modifications as per s. 22(11), makes clear that the Tribunal does not have jurisdiction to amend the OPA Appeal by adding lands which were not "added, amended or revoked in the original appeal".

[39] Further, there is no reference to the Explanatory Note in the Notice to provide a reader a reason to seek out the Explanatory Note for further details on the proposed development or the properties affected. The notion put forth by the Appellant, that no one is prejudiced by the inclusion of the Expanded Lands because no one requested status at the CMC after receiving the Notice, ignores the fact that a reader might not

have been aware of the addition of the Expanded Lands if they had not referred to the Explanatory Note.

[40] The Augend decision is relevant, very comparable, and informative to the issue before the Tribunal. In Augend, the Tribunal found that it's jurisdiction "is constrained by [the clause in s. 17(50.1) of the Act which reads "to which the notice of appeal relates"], such that the Tribunal cannot modify an appeal to include lands that were not part of the original development application nor part of the related "notice of appeal" as filed".

[41] The Appellant's assertion, that this case is distinguishable from Augend as no CMC was held related to the additional lands, is incorrect. The Augend decision states, in paragraph [16], that notice of a second CMC was served to "all parties and individuals as normally prescribed by the Tribunal and included all owners within a 120 metre ("m") radius of the Property". The 'Property', as defined in the decision, included the additional lands.

[42] The Edenshaw decision serves to confirm the findings of the Tribunal in the Augend decision and, of note in the Edenshaw case, the Appellant did not dispute the submissions regarding the Tribunal's jurisdiction.

[43] This case is distinguishable from Dufferin Mall submitted by the Appellant in a substantive manner as the Expanded Lands are separate properties under separate ownership and not part of the Property subject to the OPA Appeal. Conversely, the OPA in Dufferin Mall was expanded from a portion of the property to cover the entire property, all of which was under one municipal address. This distinction separates the cases from useful comparison, and Dufferin Mall does not aid the Tribunal in its consideration of the jurisdictional issue before it. Further, there is no reference in the Dufferin Mall decision that the notice area was expanded.

[44] Further, replacing the word 'plan' with 'privately initiated OPA' in ss. 17(50) and 17 (50.1) of the Act does not make plain or clear that the Tribunal can expand the lands geographically beyond the limits of a property subject to an appeal. Further, comparing

a geographic expansion of lands subject to an OPA to other modifications upon settlement or approval of an OPA appeal, such as community benefits and minimum amounts of non-residential space that apply only to the property subject to the OPA, is not reasonable on its face and is not helpful to determining the status of the Expanded Lands.

[45] It was the Tribunal's finding that the status of the appeal for the Expanded Lands is not procedurally pristine, and accepting the submissions of the Appellant in this regard would put the Tribunal in the position of creating an appeal for the Expanded Lands, to which it has no jurisdiction.

[46] After recessing the hearing for one day to give due consideration to the submissions of both the City and the Appellant on the Expanded Lands, the Tribunal made an oral ruling that the Expanded Lands were not properly before it and could not form part of the hearing, and that the hearing would proceed as scheduled on the basis that no meaningful prejudice is apparent to any Party.

[47] Further, the Tribunal found that the Notice issue was a moot point given the jurisdictional ruling.

MERIT HEARING

The Property and Surrounding Context

[48] The Property has an area of 1,410 square metres ("sm") with frontage of 46.0 m along the north side of Roehampton Avenue and 31.0 m along the west side of Bayview Avenue, with access from Roehampton Avenue. It is currently developed with a car wash building, an impervious surface for parking and vehicle queuing.

[49] To the west of the Property is a lane, known as the Badali Family Lane ("Badali Lane"), and three two-storey walk-up apartment buildings. Further to the west is a range of residential uses including single-detached and semi-detached dwellings, townhouses, and walk-up apartment buildings.

[50] To the north, the Property is adjacent to a seven-storey mixed-use mid-rise condominium building at 1818 Bayview Avenue (“1818 Bayview”). 1818 Bayview has no south facing windows along the lot line shared with the Property.

[51] To the east and northeast, on the east side of Bayview Avenue is a nine-storey condominium at 1801 Bayview Avenue, and a five-storey apartment building at 1833 to 1835 Bayview Avenue.

[52] Fronting the south side of Roehampton Avenue is a gas station, and further south, the balance of the block is comprised of a retail plaza anchored by a grocery store owned by Metro, and a future entrance to the Leaside Light Rail Transit (“LRT”) Station (“LRT Station”) along the Eglinton Crosstown LRT line.

[53] The LRT Station, located at the southeast corner of the Bayview Avenue and Eglinton Avenue East, with an additional entrance at the northwest corner, is one block, or approximately 120.0 m, south of the Property.

Existing Official Plan Designation and Zoning

[54] The Property is designated ‘Mixed Use Areas’ in the City Official Plan (“TOP”) and is located within the ‘Bayview Focus Character Area’ (“BFCA”) of the Yonge-Eglinton Secondary Plan (“Secondary Plan”).

[55] The Property is also located within ‘Site and Area Specific Policy 681’ (“SASP 681”) as part of OPA 570, which identifies the area as the ‘Leaside Protected Major Transit Station Area’ (“Leaside PMTSA”). SASP 681 applies to an area centred around Bayview Avenue and Eglinton Avenue East and allocates the Property a minimum density of 2.0 Floor Space Index (“FSI”). OPA 570 is City Council adopted but not yet approved by the Minister of Municipal Affairs, making it informative but not determinative in its application to the Property.

[56] The Property is zoned ‘Commercial Residential (CR 2.5) (c2.0; r2.5) SS2’ under Zoning By-law No. 569-2013 (“ZBL”).

Required Approvals

[57] The Revised Proposal seeks to reclassify the Property from 'Secondary Zone' to 'Station Area Core' on Map 21-3 of the Secondary Plan ("Map 21-3"), as shown in Figure 1 below, and annotated with the Property marked with an 'X'. The Revised Proposal also seeks to amend the ZBL with site-specific provisions to implement the proposed density, lot coverage, building height, and parking rates, among other matters.

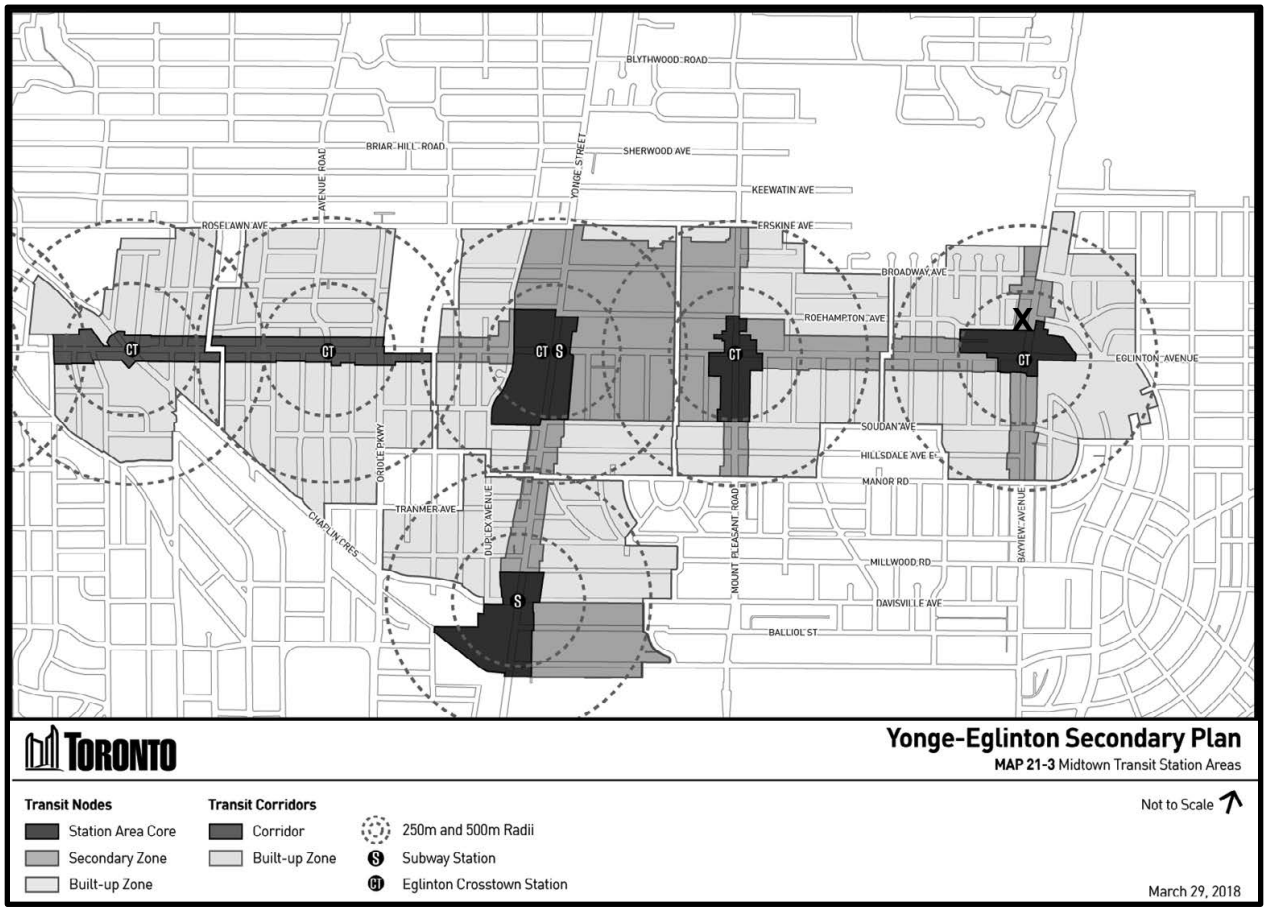

FIGURE 1

Yonge-Eglinton Secondary Plan – Map 21-3 – Midtown Transit Station Areas

(annotated with the Property marked with an 'X')

Legislative Framework

[58] When considering appeals filed pursuant to ss. 22(7) and 34(11) of the Act, the Tribunal must have regard to the relevant matters of provincial interest as set out in s. 2 of the Act, and to the decision, if any, of the City and the information considered in making the decision, as required by s. 2.1(1) of the Act. Although the ZBA Appeal relates to a non-decision by the City, it is noted that the City denied the OPA application, does not support the Revised Proposal, and is in opposition to its approval.

[59] Further, s. 3(5) of the Act requires decisions of the Tribunal affecting planning matters to be consistent with provincial policy statements and conform, or not conflict with, the provincial plans that are in effect on the date of the decision. In this respect, the Tribunal must be satisfied that the Revised Proposal is consistent with the Provincial Planning Statement, 2024 ("PPS").

[60] The Tribunal must also be satisfied that the OPA and ZBA, as part of the Revised Proposal, conform with the TOP, and that the Revised Proposal represents good land use planning and is in the public interest.

Parties and Participants

[61] Metro and BARA noted at the start of the merit hearing that neither would be calling any witnesses. Metro advised that their concerns have largely been addressed and that it would therefore be keeping a watching brief, and any submissions would be based on the evidence called by the other Parties. BARA advised that they would be relying on the City's witnesses to address their issues.

[62] The Participants' concerns with the Revised Proposal relate to the following, which the witnesses largely addressed in their evidence:

- conformity with the Secondary Plan;
- building height, massing, privacy, density, neighbourhood character, traffic and pedestrian safety, vehicle and bicycle parking spaces, on-street

parking, delivery vehicle space, congestion, wind and shadows/sunlight, setbacks, lack of green space, and lack of a pet area;

- need for subsidized affordable units, transition to neighbouring properties, assumptions of transit use, suitability of the Badali Lane, landscaping along the frontages, and use of an outdated community services and facilities plan; and
- impacts on local infrastructure, including sewage systems/roads/health care facilities/schools/parks/community services/daycares/health care, the need for mid-rise versus high-rise intensification, and impacts on the environment, aquifer, groundwater, drainage, and run-off.

Witnesses

[63] The Tribunal qualified the following witnesses to provide expert opinion evidence in their respective areas of expertise, as noted below:

For the Appellant:

- Andrew Ferancik – land use planning;
- Peter Clewes – architecture and urban design;
- Pascal Monat – servicing engineering; and
- Peter Yu – transportation planning; and

For the City:

- Michael Sakalauskas – urban design;
- Adam Vandermeij – urban forestry and arboriculture; and
- Angela Zhao – land use planning.

[64] All witnesses were qualified by the Tribunal on consent of the Parties.

Agreed Facts and Issues

[65] At the outset, the Parties advised the Tribunal that the transportation and functional servicing issues were resolved ahead of the merit hearing and were no longer at issue.

[66] The Parties also agreed that the Property is a tall building site that can support additional height beyond 35 storeys, as permitted in the Secondary Plan.

[67] The witnesses for both the Appellant and the City provided contextual parameters to distinguish the Property as a development site for a tall building, but differed in their opinion on whether it was appropriate for a 46-storey building, and the appropriateness of the proposed tower setback to the north, the base building setback to the east, and the transition to the west. Shadow and wind impacts were minor issues discussed by both Parties.

Evidence, Analysis, and Findings

[68] For the reasons that follow, the Tribunal allows the Appeals.

Secondary Plan Reclassification, Tower Height and Transition

Appellant

[69] Mr. Ferancik advised that the Property is within one of four 'Midtown Cores' ("Cores") within the Secondary Plan, namely the BFCA. The BFCA is identified in the Secondary Plan as being "predominantly characterized by mid-rise buildings punctuated with tall buildings in proximity to the new transit station, which will also support the expansion of office, residential and retail development in the area, creating a mixed-use, transit-oriented node". He added that the LRT Station is in close proximity to the Property and that the Revised Proposal is appropriate for the development of the land given the BFCA policies.

[70] Mr. Ferancik proffered that, although the Secondary Plan notes that the "scale and form of intensification will be generally less" in the BFCA (as well as the Davisville Station Character Area and the Mount Pleasant Station Character Area) than in the 'Yonge-Eglinton Crossroads Character Area' ("YECCA"), the Property is also within the Leaside PMTSA and adjacent to the 'Station Area Core' transit node. He added that the four Cores "work together", and that the scale of development in the BFCA is informed by the other Cores. He noted that the Leaside PMTSA policies represent the City's intent for the area. He further noted that the Property is within the second highest density category in the Leaside PMTSA at 2.0 FSI, representing a compelling public interest for intensification, and is indicative of the degree of intensive development envisioned for the Property and surrounding community within the BFCA.

[71] Mr. Ferancik noted that the Secondary Plan does not require a gradual transition down in building heights in all directions in the BFCA. He opined that the Revised Proposal introduces a point-tower development typology in the BFCA where new tall buildings the Secondary Plan anticipates, but does not limit development to, a height range of 20 to 35 storeys. Additionally, the Secondary Plan provides that an OPA "will not be required in order to achieve a greater or lesser height". He added that, in other words, the BFCA policies contemplate a range of heights and variation on a block-to-block basis.

[72] Relative to some other lands classified as 'Station Area Core' in the BFCA, Mr. Ferancik noted that the Property is closer to the LRT Station and, with the 'Mixed Use Areas' designation in place, the Revised Proposal is appropriate, requiring only a reclassification of the 'Midtown Transit Station Areas' on Map 21-3 from 'Secondary Zone' to 'Station Area Core'. He added that this would not create an island of 'Station Area Core' land, as it would be contiguous to 'Station Area Core' lands to the south and east.

[73] Mr. Ferancik also noted that the extent of the 'Station Area Core' lands for the three other Cores on Map 21-3 match the 'Midtown Character Areas' on Map 21-2 of the Secondary Plan ("Map 21-2"), yet that is not the case for the BFCA, noting that the

northern portion of the BFCA, including the Property, is not similarly included in the ‘Station Area Core’. He described it as a curiosity since such lands in the northern portion of the BFCA are designated ‘Mixed Use Areas’ and are within one of the Cores.

[74] Mr. Ferancik noted that the concentric circles illustrated on Map 21-3 indicate lands that are “transit-adjacent neighbourhoods primed for intensification” and that the Property is within the inner circle, being within a 250 m radius of the LRT Station, which policy 2.4.2 of the Secondary Plan notes “will include transit-supportive development”.

[75] Mr. Ferancik opined that the OPA would bring Map 21-3 into conformity with the ‘Mixed Use Areas “C”’ land use designation on Map 21-4 of the Secondary Plan with respect to the Property as, along the Property frontage, Bayview Avenue is considered a ‘Priority Retail Streets’ on Map 21-5 of the Secondary Plan. Additionally, he added that reclassifying the Property to ‘Station Area Core’ will ensure that the minimum densities of policy 2.4.4 of the Secondary Plan are met, and ideally exceeded in the long-term.

[76] With respect to built form, Mr. Ferancik opined that the Revised Proposal provides for a new tall building that is similar in height and form to that of other existing and planned tall buildings in the BFCA, and the height proposed respects the overall hierarchy of heights evolving in the other Cores in the Secondary Plan.

[77] Mr. Ferancik submitted that the Revised Proposal’s building height reinforces the hierarchy of heights established between the four Cores and within the BFCA, noting the recent approval at 55 to 75 Brownlow Avenue, which exceeds the Mount Pleasant Station Core’s height range by 20 and 24 storeys.

[78] It was Mr. Ferancik’s opinion that the reclassification of the Property to ‘Station Area Core’ is a suitable classification for the proposed building height, and that a height of 46 storeys is, “on balance, supported by the overall vision, goals and objectives of the Secondary Plan and will contribute to the long-term achievement or exceedance of planned minimum density targets over the long term (Section 2.4.4)”.

[79] With respect to other approvals within the Secondary Plan area, Mr. Ferancik addressed where heights above the anticipated height range of the Secondary Plan were achieved, and in some cases supported by City staff and approved by City Council (including 55 to 75 Brownlow Avenue, 50 Merton Street, 503 Eglinton Avenue East and 2674 Yonge Street). He concluded that the Revised Proposal fits well within the context of emerging approvals in the Secondary Plan area.

[80] Mr. Ferancik proffered that there is a trend of height exceedances in the Secondary Plan area, and in the BFCA, concluding that this trend represents an evolution of the hierarchy of the Secondary Plan.

[81] Mr. Ferancik noted that the Revised Proposal does not introduce any unacceptable wind, shadow, or traffic impacts to the surrounding area, and is appropriate in the 'Mixed Use Areas' designation given the Property is one of the closest sites to the LRT Station, providing a significant incentive for compact housing options and reduced auto dependency. With respect to shadow impacts, Mr. Ferancik proffered that, although the Revised Proposal exceeds the anticipated height range of the BFCA, it does so in a manner that is highly sensitive to surrounding land uses and context and, given its slender floorplate, does not introduce "net new shadows" onto the park to the west or surrounding schools, nor onto the cemetery lands to the north. He noted that nearby 'Neighbourhoods' designated areas have no policy basis for protection from shadows in the Secondary Plan.

[82] In summary, Mr. Ferancik opined that the Revised Proposal meets the intent of the built form policies of the Secondary Plan and implements a building height that will fit harmoniously within its existing and planned context of the BFCA, and respects the overall hierarchy of heights evolving in other 'Core' Character Areas of the Secondary Plan.

City

[83] Ms. Zhao opined that the proposed reclassification from ‘Secondary Zone’ to ‘Station Area Core’ is not appropriate as the ‘Station Area Core’ classification is intended to accommodate the highest intensity of development in the area. She added that the Revised Proposal, “at its height, density, design, and configuration”, is not appropriate “and as such, would still not be suitable, even in a designation intended to accommodate a higher intensity of development”, i.e., within the ‘Station Area Core’ classification.

[84] Ms. Zhao noted that the “intensity of development in the Secondary Zone…generally transition[s] down in height and scale to surrounding Built-up Zones”. She opined that, with the policies of the Secondary Plan in mind, “the intended character of this site can be summarized as an area where intensification is anticipated, but to a lesser intensity than the Station Area Core”. She furthered that the “intensity of development, building types, heights and land uses are to ensure that the built form is compatible with surrounding areas”.

[85] Ms. Zhao added that the proposed height would only be appropriate in the YECCA, where heights of 35 to 65 storeys are anticipated. She concluded that the Revised Proposal would disrupt the urban structure envisioned by the Secondary Plan, where the scale and form of intensification is expected to be ‘significantly’ less in the BFCA than in the YECCA. On cross-examination, she conceded that the wording in the TOP (not the Secondary Plan) is that the scale and form of intensification will be ‘generally’ less in the BFCA than in the YECCA, rather than ‘significantly’ less.

[86] Despite the Parties agreeing that the Property is a tall building site, Ms. Zhao stated that tall buildings are not contemplated on all sites within the BFCA and are more appropriately located within the ‘Station Area Core’, where more intense developments are to be directed. Furthermore, she noted that the TOP identifies that not every development site is appropriate for a tall building and that they should only be considered where they can fit into the existing or planned context, and where the size,

configuration, and context of a property allows for the appropriate design criteria to be met. However, she did concede that building heights are to be specifically determined through rezoning applications or a City-initiated ZBA, and that an OPA would not be required in order to achieve a greater height.

[87] Ms. Zhao proffered that a height greater than 35 storeys could be supported by the City up to 39 storeys based on section 3.2.4 e. of the City's Tall Building Design Guidelines ("TBDG"), which states:

> When multiple towers are proposed, stagger the tower heights to create visual interest within the skyline, mitigate wind, and improve access to sunlight and sky view. In general, variation of 5 storeys or more provides a difference in height that can be perceived at street level.

[88] Based on this policy, it was Ms. Zhao's opinion that a 39-storey building could be supported as, with an additional four storeys, it would not be perceivable when viewed from the public realm and would be a diminutive difference with respect to shadow impacts. On cross-examination, she noted that a 40-storey building, being five storeys over the 35-storey maximum, would not be supportable as it would be perceivable from the public realm, based on policy 3.2.4 e. of the TBDG. She did not concede that a variation of seven storeys, as proposed, would be 'almost imperceptible' from the public realm.

[89] Ms. Zhao addressed the intended character of the Property, noting it can be summarized as an area where intensification is anticipated, but to a lesser extent than the 'Station Area Core'. The intensity of development, building types, heights, and land uses are to ensure that the built form is compatible with surrounding areas. It was her opinion that the proposed reclassification of the site from 'Secondary Zone' to 'Station Area Core' does not accomplish the planned context of the Secondary Plan to establish the intended hierarchy. She illustrated this by noting that the tallest approved buildings in the BFCA are 40 and 35 storeys in the 'Station Area Core', then stepping down to the 'Secondary Zone', with heights ranging down to 31, 29, and 25 storeys. She proffered that it would facilitate a building that is out of scale and inappropriate given the planned

transition in height set out in the Secondary Plan, and implemented through various existing approvals.

[90] Ms. Zhao added that the Revised Proposal does not fully consider the surrounding context that was used to determine the applicable transit nodes and, as a result, overrides the requirement for lands in the ‘Secondary Zone’ to act as a buffer and a transition zone to surrounding ‘Built-up Zones’ and ‘Neighbourhoods’ areas. Further, she opined that the reclassification to ‘Station Area Core’ and the Revised Proposal would cause an abrupt change from a tall building to a low-rise area without providing a gradual transition. However, she also advised that the City had received an OPA application for major intensification of the remainder of the block west of the Badali Lane and that, in the fullness of time, transition to the immediate west was less of a concern.

[91] With respect to wind and shadow impacts, Ms. Zhao opined that, if 1818 Bayview were to seek a similar setback to the south, it would result in a severely diminished tower separation and have negative impacts in terms of access to light, sky view, privacy, and open space, concluding that, in this context, the Revised Proposal would not facilitate orderly development, nor provide for a healthy community. She added that reduced tower separation in this manner would also not provide sufficient privacy to adjacent buildings.

[92] In summary, Ms. Zhao opined that the reclassification to ‘Station Area Core’ and the proposed building height of the Revised Proposal are not appropriate or desirable, do not meet the policies of the Secondary Plan, and fail to provide appropriate transition as the tower deviates from the established urban structure that provides for heights to be tallest near the LRT Station.

Finding

[93] The Tribunal notes that, as addressed by Mr. Ferancik, there has been an evolution in the implementation of the Secondary Plan, such that height exceedances

are the norm, given that the TOP does not require an OPA to allow for exceedances, and given that they are often supported by the City.

[94] The Tribunal is persuaded by the evidence of Mr. Ferancik that the OPA is appropriate based on the Property being in close proximity to the LRT Station and contiguous to 'Station Area Core' lands to the south and east. Extending the 'Station Area Core' classification to include the Property would result in a natural extension of the classification. This is supported through a comparison of the extent of the 'Station Area Core' lands on Map 21-3 to the 'Midtown Character Areas' on Map 21-2 for the BFCA. As noted by Mr. Ferancik, unlike for the other Cores, the two maps do not generally match. The City did not address the difference between the two maps compared to the other Cores, leaving the reasoning unanswered. The Tribunal finds that a reclassification of the Property would serve to make the maps align more closely and would not cause further disparity.

[95] Ms. Zhao's evidence lacked an analysis of the appropriateness of the OPA request and rather focused on the existing classifications to justify not supporting the request. Her reasoning equated to an analysis that, since it isn't so classified, it shouldn't be so classified. This does not offer the Tribunal insight to the City's evaluation of the OPA.

[96] In her witness statement, Ms. Zhao stated that "the development would be the tallest building in the vicinity, despite not being located in the Station Area Core", effectively not considering the OPA application to reclassify the Property to 'Station Area Core'. It is the Tribunal's finding that she did not provide an evaluation of a reclassification of the Property, nor acknowledge that there are significant areas in the BFCA that do not provide any transition from lands classified 'Station Area Core' to lands classified 'Built-up Zone'. The Tribunal finds this lacking and that it undermines her arguments related to transition, particularly as she acknowledged the lands to the west of the Property are the subject of an OPA application and expected to be intensified, providing transition to the west.

[97] Map 21-3 provides no transition from the ‘Station Area Core’ along Eglinton Avenue to the ‘Built-up Zone’ lands west of the Property. Although the ‘Station Area Core’ lands along Eglinton Avenue are separated from the lands to the west by Roehampton Avenue in this area, the Property is similarly separated from the lands to the west by the Badali Lane. Further, there is no transition provided between the ‘Station Area Core’ lands to the east of Bayview Avenue on Map 21-3 and the ‘Built-up Zone’, which does not benefit from separation by a road or lane. The Tribunal therefore finds that transition is not a determinative concern for consideration of the Applications.

[98] The Tribunal also finds that Ms. Zhao’s evidence related to intensification appeared to infer an equivalence to building height, which is not useful in the evaluation of the Applications, as the two are not directly interchangeable. It is a given that, with a slender building floorplate, increased building height affects intensification, but the Property is considered suitable for intensification by all Parties, and any impacts of the proposed building height were not effectively articulated by the City.

[99] Further, Ms. Zhao’s support for a maximum 39-storey building, based on the perceivability of the height difference at street level of five or more storeys according to policy 3.2.4 e. of the TBDG, is not compelling. The policy is related to creating visual interest by staggering multiple towers and does not evince a negative connotation of perceivable differences in building height at street level. Further, the Tribunal does not accept that the perception of height differences from the public realm is a consequential factor in determining the appropriateness of the Revised Proposal given the wording of policy 3.2.4 e. Additionally, the established urban structure providing for heights to be tallest near the LRT Station is evolving, and the Property is proximate to the LRT Station at only 150.0 m to the north.

Tower Setback to the North

Appellant

[100] Mr. Ferancik explained that, on the north property line, the base building has a setback of 0 m at the first floor and mezzanine level, the podium has a setback of 7.26 m, while the tower cantilevers over the podium with a setback of 5.5 m. He opined that the combination of a cantilever and increased podium setback "provides good proportion" between the Revised Proposal and 1818 Bayview.

[101] Mr. Ferancik submitted that the Revised Proposal implements the built form policies of the TOP and employs a range of tower and podium setbacks and stepbacks that "reinforce a sense of place, scale and transition within the context of existing and planned towers" in the BFCA and the Secondary Plan. He specified that the setback and stepback parameters represent good block planning and development, ensuring the long-term viability of a future potential tall building to the north at 1818 Bayview.

[102] Mr. Ferancik opined that a 5.5 m tower setback is a widely used setback standard across the City for interfaces to main walls of low- or mid-rise buildings with windows, and noted that 1818 Bayview has no windows on the south building elevation, presenting no privacy or overlook concerns. Additionally, he proffered that, through a preliminary study of 1818 Bayview, it could feasibly be redeveloped with a similar single tower above a podium, with the tower reasonably located at the northern end of the property resulting in a two-tower block bounded by Bayview Avenue, Roehampton Avenue, the Badali Lane, and Glazebrook Avenue ("Block"). He noted that a tower on 1818 Bayview could achieve at least a 25.0 m tower separation within the Block, even with the proposed 5.5 m north tower setback on the Property. It was his opinion that the proposed 5.5 m north tower setback does not create any reasonable risk of a future condition where towers are not sufficiently separated on the Block.

[103] Mr. Ferancik opined that the Property and 1818 Bayview are capable of supporting two towers on the Block as "bookends" along Bayview Avenue. He furthered

that it is good block planning, and would maintain the overall intent of the TBDG, to situate towers as bookends to blocks “where a strong, extensive, and lower-scaled pedestrian focused streetwall is maintained between the two towers as a podium, and by locating the tower element at intersections”.

[104] Despite the block planning exercise, Mr. Ferancik noted that 1818 Bayview is currently developed with a condominium building and, as such, is less likely to redevelop than a vacant site, rental apartment, or commercial property.

[105] It was Mr. Ferancik’s opinion that the Property is appropriate for a tall building in the context of the Block reasonably developing with two towers along Bayview Avenue. He proffered that a 5.5 m tower setback to the north is appropriate in the context of 1818 Bayview as currently developed with a mixed-use condominium with no south facing windows. He opined that, however unlikely it would be for 1818 Bayview to redevelop in the near future, any new development in the context of the Block would reasonably take the form of a single tower located at the corner of Bayview Avenue and Glazebrook Avenue, noting that 1818 Bayview is not a feasible two-tower redevelopment site. Further, in Mr. Clewes’ reply witness statement, he noted that the Block is “not reasonably a three-tower block”.

[106] Mr. Ferancik referenced a table in his witness statement that listed several approved development applications, within the Secondary Plan area and City-wide, where reduced setbacks of 5.5 m or less were achieved without a limiting distance agreement in place (“Table 4”). He concluded that a 5.5 m tower setback is an established setback parameter of approved ZBAs in the Secondary Plan area and City-wide, “in particular where it has been deemed that immediate site adjacencies are not feasibly proportioned to site towers perhaps as envisioned by the … [TBDG]”.

[107] Mr. Ferancik referenced the approved development application for 11 Lillian Street on Table 4 as a comparable, where a tower setback of 4.0 m adjacent to a three-storey condominium site was supported by City staff due, in part, to the recognized

difficulty of buy-in by the condominium owners for redevelopment, rendering it not feasible as a redevelopment site.

[108] Mr. Ferancik proffered that there is precedent in the City for similar conditions at 589 Eglinton Avenue East, which came about as a Council-adopted settlement with a tower sited on the lot line with an adjacent mixed-use condominium building. The settlement provides a similar two-tower block plan as what might develop on Block.

[109] With respect to balconies projecting into the 5.5 m setback, Mr. Ferancik responded in his reply witness statement to Mr. Sakalauskas' assertion in his witness statement that such a "separation distance to tall building balconies has not been accepted nor approved in accordance with the city's TBDG, failing the use of mutually agreed upon instruments to ensure orderly development". Mr. Ferancik opined that Mr. Sakalauskas' assertion in this respect was not factually correct, and that Table 4 includes applications where tower setbacks of 5.5 m were approved, some with projecting balconies, without instruments such as limiting distance agreements. It was his opinion that balconies on the north elevation, as proposed, is appropriate.

[110] Mr. Clewes commented on the effect of a 10.0 m setback to the north, with reduced setbacks to the west, south, and east as compared to the Revised Proposal, as suggested by the City to be acceptable and as illustrated on pages 15 and 16 of the City's Visual Evidence (marked as Exhibit 19) ("City Tower Options"). Referencing his Reply Visual Evidence (marked as Exhibit 30) to illustrate the effect on the tower, he noted that the resulting internal layout of the building would require the core (including stairs, elevators, and corridor) to be too long and narrow, impacting the functionality of the layout and rendering the building not viable.

City

[111] It was Mr. Sakalauskas' opinion that the Revised Proposal does not adequately address the potential for redevelopment of 1818 Bayview, puts the onus on 1818 Bayview to provide the bulk of the tower separation, and undermines the planned

context and objectives of the Secondary Plan. Further, he noted that the balconies on the north face of the building are proposed to project into the 5.5 m setback by 1.5 m resulting in a 4.0 m setback to the edge of the balconies.

[112] Both Mr. Sakalauskas and Ms. Zhao proffered that 10.0 m has become an accepted City standard for tower setbacks to property lines in many cases, which could be acceptable on the Property, but that a further reduction to 5.5 m is not acceptable. Mr. Sakalauskas noted the pressures on smaller sites in proximity to higher order transit as a factor in this regard but stated that the Appellant can't be "absolved of its duties" to provide half of the separation distance on the Property just because it is the first on the Block to redevelop.

[113] Mr. Sakalauskas proffered that a 10.0 m setback from the north could result in an achievable tall building as illustrated on the City Tower Options, both of which are referred to as the "Preferred City Placement Option". He opined that these tower placements would achieve the policy objectives and suggested that the area of the tower floor plate is similar to the Revised Proposal.

[114] Mr. Sakalauskas proffered that the City would allow balconies to extend into the tower setback on the west, south, and east elevations, but not to the north property line with a reduced tower separation distance. He added that there are examples of condo buildings without balconies on every elevation and noted that the City's acceptance of a 10 m setback would require the balconies, if any, to be included in the setback.

[115] With respect to the examples of buildings approved with setbacks less than 10 m, as proffered by Mr. Ferancik in Table 4, Ms. Zhao suggested that they were not of a comparable context due to irregular shaped lots, and closer proximity to Major Transit Station Areas, among other reasons.

[116] Ms. Zhao opined that, with respect to tower setbacks and potential tower separation, the Revised Proposal does not have appropriate regard for the relevant matters of provincial interest in ss. 2(h) and 2(r) of the Act. She supported this opinion

on the basis that, if 1818 Bayview were to redevelop in the future, the owner could request a 5.5 m tower setback to their south property line, which would result in "severely diminished tower separation and have negative impacts in terms of as access to light, sky view, privacy, and open space" [*sic*]. She proffered that the Revised Proposal is not well-designed due to the proposed tower setback to the north. It was her opinion that, without appropriate tower setbacks, the Revised Proposal would not facilitate orderly development and would not provide for a healthy community.

[117] Further, Ms. Zhao proffered that the Revised Proposal does not meet the TBDG with respect to the tower setback to the north and would not provide appropriate tower separation if 1818 Bayview were to be redeveloped with a tower. She characterized it as a "significant deficiency" which results in the Revised Proposal not conforming to the TOP.

Finding

[118] The Tribunal is not persuaded by Ms. Zhao's testimony that the Revised Proposal would severely diminish the tower separation if 1818 Bayview were to submit an application for redevelopment with a similar setback to the south. It is trite to say that an application requesting such a setback does not translate to approval of that setback. Land use planning decisions are discrete and not precedent setting, given varying site characteristics and parameters that impact decision making. The Tribunal finds Ms. Zhao's concern that a future redevelopment application for 1818 Bayview might seek to have a 5.5 m setback to the south is speculative and not a reasonable basis to determine the Revised Proposal. Her further concerns related to negative impacts on access to light, sky view, privacy, and open space due to "severely diminished tower separation", are similarly speculative.

[119] The Tribunal prefers the testimony of Mr. Ferancik related to a more probable future plan of locating a tower at the north end of 1818 Bayview, if and when it is redeveloped. Further, the City has the authority to refuse a similar setback request.

Further still, the owners of 1818 Bayview did not seek Party or Participant status to raise objections to the Revised Proposal.

[120] Mr. Sakalauskas' assertion that the City's acceptance of a 10.0 m setback to the north would require the balconies to be included in the setback is not addressed or contemplated in the TBDG, while section 3.2.3 of the TBDG allows for balconies to be excluded from the tower separation distance requirement of 12.5 m from property lines. It is the Tribunal's finding that the consideration of the balcony setback to the north is not a determinative factor in the consideration of the tower setback to the north and agrees with Mr. Ferancik that balconies on the north elevation, as proposed, is appropriate.

[121] The Tribunal finds Mr. Clewes' testimony, related to the impacts of a 10.0 m setback to the north on the floor plate and the core of the building, rendering it not viable, to be compelling. In this respect, and combined with Mr. Ferancik's testimony, the Tribunal finds a 5.5 m setback to the north to be appropriate in the circumstances.

Base Building Setback to the East

Appellant

[122] Mr. Clewes referenced the ground floor site plan in the Right of Way Clearance Requirements Markup (marked as Exhibit 35), which illustrates setbacks to the property line along Bayview Avenue ranging from 1.27 m to 2.24 m, and a revised 6.0 m curb to building face setback along the length of the frontage on Bayview Avenue, with a slightly larger setback at the corner of Bayview Avenue and Roehampton Avenue. He noted that the base building setback along Bayview Avenue provides for a pedestrian clearway ranging in width from 2.6 m to 3.4 m.

[123] Although the curb to building face setbacks shown on page 13 of the City's Visual Exhibits shows a setback of 5.7 m to Bayview Avenue for 1818 Bayview, Mr. Clewes noted that, at the south end of 1818 Bayview adjacent to the Property, the

setback is 4.74 m. He added that, with a 6.0 m setback to Bayview Avenue proposed for the Property, the public realm will be widened.

[124] Mr. Clewes also noted that the public realm portion of the relatively large curb to building face setbacks ranging from 7.61 m to 11.5 m along the east side of Bayview Avenue, as illustrated on page 13 of the City's Visual Exhibits, are significantly reduced in many areas by either landscaping, fences, retaining walls, or a combination thereof, resulting in a narrow public realm limited to the width of the sidewalk.

[125] With respect to the proposed retail space along the Bayview Avenue frontage, Mr. Clewes noted that increasing the curb to building face setback to 8.0 m, as suggested by the City, would impinge on the depth of the retail units reducing the depth of the smallest portion of the retail units to a minimum of 6.2 m, which, in his opinion, would make it challenging to secure tenants. Further, he noted that the provision of direct public access to the retail units along Bayview Avenue, which is identified as a Priority Retail Street in the Secondary Plan, could be secured through the SPA process.

[126] With respect to the provision of street trees, Mr. Clewes noted that an existing Toronto Hydro conduit buried beneath the sidewalk precludes the planting of street trees along Bayview Avenue, and that raised tree planters would require additional width than proposed. He submitted that alternative plans for street trees could be addressed through the SPA process, and that trees are proposed along the Roehampton Avenue frontage.

[127] Mr. Ferancik added that the public realm policies in section 3.1.1 of the TOP require new developments to enhance the public realm in support of the broader development objective of complete communities. It was his opinion that the proposed setbacks along Bayview Avenue will provide ample space along the street frontage to implement a high-quality expanded public realm and pedestrian sidewalk zone and provide an opportunity for grade-related landscape improvements, thereby meeting the public realm policies of the TOP. In addition, he opined that the cantilevered podium would provide weather protection and "wind downwash" mitigation for pedestrians.

City

[128] It was Ms. Zhao's opinion that the Revised Proposal does not fit the broader existing and planned context for the public realm along Bayview Avenue as a Priority Retail Street. She opined that, as more pedestrian traffic is anticipated due to the LRT Station, the public realm should be wider along the Property frontage. She added that the proposed 1.27 m setback to the property line is significantly narrower than the setback provided on other approved developments in the area (4.0 m for 2 to 20 Glazebrook Avenue, and 4.6 m for 1840 Bayview Avenue) and opined that the resulting narrower public realm does not fit within the broader existing and planned context.

[129] It was Ms. Zhao's opinion that the Revised Proposal does not have regard to s. 2(r) of the Act as it does not provide for public spaces that are of high quality, safe, accessible, attractive, and vibrant, due to the setback along Bayview Avenue being too narrow to provide for adequate improvements to support a safe and accessible public realm.

[130] Mr. Vandermeij acknowledged the issue with the existing Toronto Hydro conduit and addressed policy 3.1.3.10 of the TOP, which, he proffered, emphasizes the importance of creative approaches to the public realm and requires urban designs that incorporate natural elements and prioritize street trees "even in constrained spaces". He added that by leveraging innovative solutions, such as cantilevered structures and increased ground-floor setbacks, it would be possible to provide sufficient soil volumes for street trees while preserving the gross floor area of the Revised Proposal.

[131] Mr. Sakalauskas proffered that several other developments in and surrounding the BFCA have been able to provide a curb to building face setback wider than 6 m, and on average close to 8 m, as illustrated on page 12 of the City's Visual Evidence. It was his testimony that the Property should be able to provide an 8.0 m setback, especially due to its proximity to the LRT Station.

[132] It was Mr. Sakalauskas' further opinion that the proposed setbacks on Bayview Avenue do not adequately meet the spacing needs required by pedestrians in a highly travelled transit area, and that a minimum curb to building face setback of 8.0 m is more in line with the anticipated pedestrian volumes near the LRT Station, along with streetscape improvements to buffer pedestrians from Bayview Avenue and to allow the retail use to thrive.

[133] On cross-examination, Mr. Sakalauskas proffered that the standard City sidewalk width is 1.2 m, but that the City looks for compliance with the *Accessibility for Ontarians with Disabilities Act, 2005* ("AODA") standard of 2.1 m. He acknowledged that the Revised Proposal meets the AODA standard, but added that the City seeks a wider sidewalk width than 2.1 m near LRT stations and would prefer a public realm of 8 m from curb to building face.

[134] Mr. Sakalauskas further opined that the Revised Proposal would create adverse wind impacts on the Bayview Avenue public realm "without appropriate mitigation efforts, including, but not limited to, increased setbacks, building stepbacks, canopies, overhangs, and streetscape greening". It was his opinion that appropriate setbacks are not provided at grade, especially along Bayview Avenue, where unsafe wind conditions are identified. He proffered that landscaping, in the form of "high branching deciduous trees", could mitigate the down-washing effect of winds along the Bayview Avenue public realm.

Finding

[135] The Tribunal prefers the evidence of Mr. Clewes and Mr. Ferancik and finds that the City's promotion for an increased setback up to 8.0 m to be a "nice-to-have" but that, other than the 8.0 m setback secured for the redevelopment of 2 to 20 Glazebrook Avenue and 1840 Bayview Avenue, other properties in the vicinity exhibit narrower accessible public realms along Bayview Avenue. Mr. Sakalauskas confirmed that the Revised Proposal, with a 6 m setback, meets the City's standards and the AODA standard sidewalk width of 2.1 m.

[136] The Tribunal notes that policy 3.1.3.10 of the TOP prioritizes, but does not require, street trees for improvements to boulevards and sidewalks. There is no wording in the policy to prioritize street trees "in constrained spaces", as described by Mr. Vandermeij, and street trees are not a requirement of the TOP or the Secondary Plan.

[137] The Tribunal finds that it is important to weigh the benefits of an increase in the setback from Bayview Avenue against the viability of the proposed retail space, and is satisfied that a 6.0 m setback along Bayview Avenue, with improvements to the public realm to be determined through the SPA process, is sufficient to provide a high-quality public realm without the planting of street trees, while providing for an appropriate retail space configuration.

[138] Finally, Mr. Sakalauskas' opinion that there are unsafe wind conditions along Bayview Avenue does not align with the quote from the Pedestrian Level Wind Study ("Wind Study") included in his witness statement that reads: "Adjacent sidewalks to the east and north also experience increases in wind speeds with the inclusion of the proposed development; these areas generally remain suitable for their intended usage" [emphasis added]. This contradiction or misinterpretation of the findings of the Wind Study undermines his arguments related to wind conditions.

Summary Evidence

Appellant

[139] Mr. Ferancik opined that the Revised Proposal has regard for the relevant matters of provincial interest in s. 2 of the Act as it optimizes the use of higher-order public transit, promotes new employment opportunities, implements a full range of housing options, and encourages a sense of place with a strong built form presence at a prominent corner location in the BFCA, where new tall buildings are anticipated. He further opined that the Revised Proposal would contribute to reduced greenhouse gas emissions through a reduced parking supply, facilitate transit and active transportation,

and support a level of intensification that promotes the long-term viability of the LRT Station.

[140] Mr. Ferancik proffered that the Revised Proposal is consistent with the PPS with respect to intensification within a 'Strategic Growth Area' of a large and fast-growing municipality, is at a scale that is appropriate in the context of the proposed 'Station Area Core' classification, and is at a height that fits harmoniously within the context of existing and planned heights within the BFCA and the other Cores in the Secondary Plan. Further, it was his opinion that the built form provides appropriate transition to surrounding sites, considers the long-term viability of redevelopment of the Block context, and provides appropriate setbacks to lower-scaled areas to the west of the Property.

[141] It was Mr. Ferancik's further opinion that the Revised Proposal conforms to the TOP and better supports the implementation of its policies than the current Secondary Plan 'Secondary Zone' classification when interpreting the policies on balance, and when read as a whole. He opined that the proposed built form achieves all relevant City-wide policy objectives for tall buildings in 'Mixed Use Areas'. Further, he proffered that the proposed reclassification to 'Station Area Core' responds more appropriately to the policies of the TOP in the context of the Leaside PMTSA.

[142] Mr. Ferancik opined that the proposed mix of uses supports a balance of residential and non-residential growth and implements the vision of the Secondary Plan. Further, the reclassification to 'Station Area Core' responds appropriately to the overall policy direction of the Secondary Plan and is consistent with how similar sites are classified in the other Cores. In addition, it was his opinion that the Revised Proposal has appropriate regard for the implementation of the TBDG, the Growing Up: Planning for Children in New Vertical Communities Urban Design Guidelines, 2020 ("Growing Up Guidelines"), the Midtown Public Realm Implementation Strategy Report, the Retail Design Manual, Pet Friendly Design Guidelines, and the Bird-Friendly Development Guidelines.

[143] It was Mr. Ferancik's opinion that the Applications should be approved, and that the conditions (marked as Exhibit 13), as submitted by the Parties in the event the Revised Proposal is approved, are appropriate, represent good land use planning, are in the public interest, and are consistent with the conditions imposed on other approved developments.

[144] Further, in reply to Ms. Zhao's comment in her witness statement that the Revised Proposal does not provide sufficient exterior amenity space, Mr. Clewes added that the exterior amenity space could be increased from 133 sm to 423 sm on the Level 2 floor plan.

City

[145] Ms. Zhao opined that the Revised Proposal does not have regard for the relevant matters of provincial interest in s. 2 of the Act, as addressed in paragraphs [116] and [129].

[146] It was Ms. Zhao's opinion that the Revised Proposal is not consistent with the PPS as, at 350 residents and jobs combined per hectare ("RJ/H"), the proposed density would exceed the minimum density target for the Leaside PMTSA of 200 RJ/H. She concluded that the proposed density and reclassification to 'Station Core Area' are not appropriate as the Property is too small to support the proposed built form and is not required to meet the minimum density targets. She found that there is therefore no rationale for the Revised Proposal.

[147] It was Ms. Zhao's further opinion that the Revised Proposal does not conform to the Secondary Plan as addressed in paragraph [92], does not meet the intent and purpose of the TBDG, appears to meet the Growing Up Guidelines in terms of unit size distribution, and meets the Pet Friendly Design Guidelines. She added that approval of the Applications would be precedent setting, providing for other approvals to request additional height.

[148] It was Ms. Zhao's opinion that the Revised Proposal does not represent good land use planning, and that the Applications should be refused. She noted that, if the Applications are approved, the conditions submitted by the Parties (marked as Exhibit 13), should be imposed.

Summary Finding

[149] The Property is located within close proximity to the LRT and the Tribunal finds that the Revised Proposal provides appropriate intensification, an efficient use of land and infrastructure, and a range and mix of housing types with a retail component. The Secondary Plan promotes significant intensification surrounding transit stations, and the Leaside PMTSA includes direction to plan for minimum density targets.

[150] In addition to the findings related to tower height, tower setback to the north, and base building setback to the east, the Tribunal agrees with Mr. Ferancik and finds that the Revised Proposal has regard to the applicable matters of provincial interest pursuant to s. 2 of the Act, and is consistent with the PPS. Ms. Zhao's concern that the proposed density would not be consistent with the PPS as it exceeds the minimum density target for the Leaside PMTSA does not bear scrutiny, as a minimum is exactly that, and it does not hold that providing more than a minimum is not desirable or that it makes the proposal inconsistent with the PPS.

[151] The Tribunal finds that the Revised Proposal conforms to the TOP and the Secondary Plan, represents good land use planning, and is in the public interest. Further, the concerns of the Participants have largely been addressed through the testimony of the witnesses.

[152] The Tribunal finds that the Applications should be approved in principle, subject to the conditions noted below in the Order, and subject to the proposed revisions to the Revised Proposal to increase the curb to building face setback along the length of the frontage on Bayview Avenue to 6.0 m, and to increase the exterior amenity space to 423 sm.

INTERIM ORDER

[153] **THE TRIBUNAL ORDERS** that the Appeals are allowed in part, on an interim basis, contingent upon confirmation, satisfaction or receipt of those pre-requisite matters identified in paragraph [154] below, and the City of Toronto Official Plan Amendment and Zoning By-law Amendment are hereby approved in principle.

[154] The Tribunal will withhold the issuance of its Final Order contingent upon confirmation from the City Solicitor of the following pre-requisite matters:

a) the final form and content of the draft Official Plan Amendment and Zoning By-laws are to the satisfaction of the City Solicitor and the Chief Planner and Executive Director, City Planning;

b) the owner has satisfactorily addressed the Engineering and Construction Services matters in the Engineering and Construction Services Memorandum dated August 16, 2023, or as may be updated, all to the satisfaction of the Chief Engineer & Executive Director;

c) the owner has satisfactorily addressed Transportation Services matters in the Transportation Services memo dated January 19, 2024, or as may be updated in response to further submissions filed by the Owner, all to the satisfaction of the Chief Engineer & Executive Director. In particular, but not limited to, the owner is required to:

   a. provide a satisfactory loading management plan; and

   b. provide a revised P1 floor plan reflecting six visitor parking spaces;

   c. provide a revised P1 floor plan reflecting two PUDO spaces; and

   d. provide a 6.0 m corner rounding;

d) the owner has submitted a revised Travel Demand Management Plan acceptable to, and to the satisfaction of the Chief Planner and Executive Director, City Planning and the General Manager, Transportation Services and that matters arising from such Plan be secured, if required;

e) the owner has submitted a revised Pedestrian Wind Study acceptable to, and to the satisfaction of the Chief Planner and Executive Director, City Planning, and that matters arising from such Study be secured, if required;

f) the owner has satisfactorily addressed matters from the Urban Forestry memorandum dated August 3, 2023, or as may be updated in response to further submissions filed by the Owner, all to the satisfaction of Urban Forestry; and

g) the owner has submitted an updated complete Toronto Green Standards (TGS) Checklist and Statistics Template, to the satisfaction of the Chief Planner and Executive Director, City Planning.

[155] The Member will remain seized for the purposes of reviewing and approving the final form of the draft instruments, and the issuance of the Final Order.

[156] If the Parties do not submit the final form of the draft instruments and provide confirmation that all other contingent pre-requisites to the issuance of the Final Order set out in paragraph [154] above have been satisfied, and do not request the issuance of the Final Order by **Thursday, July 31, 2025**, the Applicant and the City shall provide a written status report to the Tribunal by that date, as to the timing of the expected confirmation and submission of the final form of the draft instruments and issuance of the Final Order by the Tribunal.

[157] The Tribunal may, as necessary, arrange the further attendance of the Parties by Telephone Conference Call to determine additional timelines and deadlines for the submission of the final form of the instruments, the satisfaction of the contingent pre-requisites, and the issuance of the Final Order.

[158] **THE TRIBUNAL ORDERS** that the related Site Plan Approval appeal continues to be adjourned *sine die*. The Parties are directed to provide the Tribunal with a status update in respect of the Site Plan Approval appeal by no later than **Tuesday, September 30, 2025**.

[159] The Member is not seized with respect to the Site Plan Approval appeal.

"C. I. Molinari"

C. I. MOLINARI
MEMBER