Ontario Land Tribunal
Tribunal ontarien de l'aménagement du territoire

ISSUE DATE: March 06, 2024 **CASE NO(S).:** OLT-23-001110

PROCEEDING COMMENCED UNDER subsection 17(24) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant:	John O'Connell
Appellant:	William Glass
Applicant:	Windmill Developments Ltd.
Subject:	Proposed Official Plan Amendment No.
Description:	To facilitate the development of three residential buildings
Reference Number:	D01-01-23-0012
Property Address:	2475 Regina Street
Municipality:	City of Ottawa
OLT Case No.:	OLT-23-001110
OLT Lead Case No.:	OLT-23-001110
OLT Case Name:	Glass & O' Connell v. Ottawa (City)

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

Appellant:	William Glass
Applicant:	Windmill Developments Ltd.
Subject:	Zoning By-law Amendment – Appeal of Decision
Description:	To facilitate the development of three residential buildings
Reference Number:	D02-02-22-0053
Property Address:	2475 Regina Street
Municipality:	City of Ottawa
OLT Case No.:	OLT-23-001111
OLT Lead Case No.:	OLT-23-001110
OLT Case Name:	Glass v. Ottawa (City)

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

Request by:	Windmill Developments Ltd.
Request for:	Request for Dismissal Without a Hearing

Heard: February 23, 2024 by Video Hearing

APPEARANCES:

Parties	**Counsel***
William Glass	Stéphane Émard-Chabot*
John O'Connell	Self-represented
City of Ottawa	Garett Schromm*
Windmill Developments Ltd.	Philip Osterhout*

DECISION DELIVERED BY JEAN-PIERRE BLAIS AND ORDER OF THE TRIBUNAL

Link to Final Order

INTRODUCTION

[1] The matter before the Tribunal is a Motion to Dismiss, without a hearing, the appeals bought by William Glass ("Glass") and John O'Connell ("O'Connell") (together, the "Appellants"). The Motion to Dismiss was brought by Windmill Developments Ltd. ("Windmill") pursuant to section 19(1)(c) of the *Ontario Land Tribunal Act*, 2021, S.O. 2021 ("OLT Act"), section 4.6(1) of the *Statutory Powers and Procedures Act*, R.S.O 1990, c. S.22, and sections 17(45) and 34(25) of the *Planning Act*, R.S.O. 1990, c. P.13 ("Planning Act").

[2] The appeals relate to a proposed development by Windmill on lands known municipally as 2475 Regina Street (“Subject Property”) in the City of Ottawa (“City”). The appeals were brought pursuant to sections 17(24) and 34(19) of the Planning Act following the City’s approval of an official plan amendment (By-law No. 2023-412) (“OPA”) and a zoning by-law amendment (By-law No. 2023-413) (“ZBA”) on September 27, 2023.

[3] The City filed a Responding Motion Record and supported the position of Windmill.

[4] For the reasons that follow, the Tribunal grants the requested relief.

PARTY STATUS

[5] The Tribunal noted at the start of the Motion Hearing that Windmill was not yet a Party to the appeals as the Motion to Dismiss was brought before any Case Management Conference was held. In such appeals, an applicant-developer is not automatically a Party. Considering sections 17(44.1), 17(44.2), 34 (24.1), and 34(24.2) of the Planning Act, and given Windmill’s direct interest in these appeals, as well as the consent of the Parties, the Tribunal found that there were reasonable grounds to add Windmill Developments Ltd. as a Party to the proceeding and so directed.

BACKGROUND

[6] The Subject Property is in the Inner Urban Area of the City, at the eastern end of Regina Street, west of the Kichi Zībī Mīkan, a recently renamed federal parkway. The site has an area of approximately one hectare. Currently, the site is occupied by a 40-year-old single-storey supportive group home comprised of 12 units for individuals with disabilities (“Parkway House”).

[7] To the west are low-rise detached dwellings along Lincoln Heights Road and Regina Street. These areas are designated in the City's Official Plan ("City's OP") as Neighbourhood, with an Evolving Overlay within the Inner Urban Transect.

[8] To the south of the property are 16- and 21-storey residential buildings fronting Richmond Road, with vehicular access obtained from Regina Street. Further to the south is Lincoln Fields Shopping Centre which continues to be redeveloped.

[9] These areas are designated as Hubs within the Inner Urban Transect and are within the boundaries of the Lincoln Fields Protected Major Transit Station Area ("PMTSA"). Phase 2 of the O-Train light rail transit ("LRT") system is currently under construction, and the future Lincoln Fields LRT Station on the expanded Confederation Line will be connected to the Subject Property via public pathways along the Kichi Zībī Mīkan. The existing Bus Rapid Transit ("BRT") Station at Lincoln Fields is being redeveloped. It will serve as part of the future LRT Lincoln Fields Station, specifically to serve as a transfer station between the LRT and the surrounding transit bus network.

[10] On September 27, 2023, City Council approved the OPA and ZBA to facilitate the development of three buildings. The proposed structures consist of one seven-storey building incorporating Parkway House on the ground floor and six storeys of residential units above; one 16-storey building providing residential units; and one 28-storey building consisting of residential units. With a total of 510 residential units, the buildings are planned to include a range of units from studios to one-bedroom, two-bedroom, and three-bedroom units. The proposed development is to include two levels of underground parking for both residents and visitors, and a surface parking lot servicing Parkway House.

[11] The approved OPA establishes an area-specific policy within Volume 2C of the City's OP, 2022, confirming that building heights up to 28 storeys will be permitted at the Subject Property.

[12] The approved ZBA rezones the Subject Property from Open Space to Residential Fifth Density, Subzone C, with a site-specific schedule and holding provision. The zoning implements the heights of the proposed buildings, permits the residential use and continuation of the existing group home use, and establishes site-specific performance standards relating to landscaping, setbacks for accessory structures, and parking. Notably, the holding provision requires public access through the site and for active transportation connections to rapid transit to be explored, which could include lighting and winter maintenance for the abutting pathway owned by the National Capital Commission.

ISSUE

[13] The issue for the Tribunal is to consider whether the Appellants have met their obligation to appropriately raise grounds of appeal that disclose legitimate planning grounds upon which an appeal would have a reasonable prospect of success.

[14] Section 19(1)(c) of the OLT Act provides that the Tribunal may dismiss a proceeding without a hearing if the Tribunal is of the opinion that the proceeding has no reasonable prospect of success. Similarly, sections 17(45) and 34(25) of the Planning Act provide that the Tribunal may dismiss an appeal to an official plan amendment or a zoning by-law amendment where the notice of appeal does not disclose any apparent planning grounds upon which the appeal could be allowed.

[15] The applicable legal principle in such cases is settled.[1]

GROUNDS OF APPEAL

[16] Both Appellants advance that the approved OPA and ZBA do not strictly comply with one aspect of the City's OP, namely subpolicy 12.3(1)(j) which provides as follows:

> The request for an amendment to this Plan to create an area-specific policy shall be supported by a planning rationale which includes all of the following:
>
> […]
> j) Demonstration that, where a High-rise building is proposed, that the site is within 300 metre radius or 400 metres walking distance, whichever is greatest, of an existing or funded rapid transit station, and of sufficient dimension to allow for a transition to abutting areas in built form massing; […] [Emphasis added]

[17] The Appellants submit in their respective appeals that the Subject Property is too far from the transit station to accommodate high-rise development. Appellant O'Connell wrote in his appeal form: "[…] Windmill failed to comply with the submission requirements and City Staff accepted the non-compliant area-specific policy proposal, ignoring the non-compliance." Similarly, Appellant Glass wrote: "Non-conformity with OP policies, including [p]olicy 12.3, which includes non-compliance with transect policies for neighbourhoods, that the subject property is located outside the maximum radius from a transit station to allow for high-rise development."

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[1] *East Beach Community Association v. Toronto (City),* 1996 CarswellOnt 5740 (OMB); *Bacher v. GR (CAN) Investments et al.,* 2022 CarswellOnt 7466 (Ont.DivCt), paragraphs 36 and 37; *2665100 Ontario Inc. v. Toronto (City),* 2023 CarswellOnt 2896 (OLT); *Friends to Keep Vaughan Green v. Vaughan (City*), 2023 CanLII 43656 (OLT).

[18] The Appellant Glass raised a second ground of appeal pertaining to the methodology of the Traffic Impact Assessment ("TIA") filed by Windmill in support of its applications. Appellant Glass wrote in the appeal form: "Transportation impact assessment for the project is based on outdated 2016 data and does not realistically consider impacts of spillover parking, delivery demands generated by the site (online shopping services, food delivery services, grocery delivery, etc.), demand on a residential street, etc."

[19] At the Hearing, faced with the Windmill's Motion to Dismiss which had the potential of putting an end to their appeals, neither Counsel for Appellant Glass nor Appellant O'Connell alleged any other grounds of "non-compliance" with the City's OP other than subpolicy 12.3(1)(j) and the alleged stale traffic data.

ANALYSIS

Evidence submitted on the Motion to Dismiss

[20] The material before the Tribunal on the Motion to Dismiss included the following documents:

a. **Exhibit 1:** An affidavit of John Moser, made on February 8, 2024; Mr. Moser is a professional land use planner with the GBA Group, has been a member of the Ontario Professional Planners Institute for 32 years, and is a Registered Professional Planner;

b. **Exhibit 2**: An affidavit of Andrew Harte, made on February 7, 2024; Mr. Harte is a professional transportation engineer with CGH Transportation Inc., has over 14 years of experience in the field of transportation engineering and has been qualified to give expert evidence by the Tribunal or its predecessors;

c. **Exhibit 3**: An affidavit of Lisa Stern, made on February 7, 2024; Ms. Stern is a professional land use planner employed by the City of Ottawa, has over 15 years of land use planning experience, and is a member of the Ontario Professional Planners Institute and the Canadian Institute of Planners;

d. **Exhibit 4**: An affidavit of John O'Connell, made on February 15, 2024; and,

e. **Exhibit 5**: An affidavit of William Glass, made on February 16, 2024.

[21] The Tribunal notes that neither Appellant offered affidavit evidence from expert witnesses in response to the Motion to Dismiss filed by Windmill. Although the Appellants are under no obligations to proffer expert evidence at this stage, they have not put their best foot forward by failing to submit contrary sustainable evidence or other objective evidence to defend the present Motion to Dismiss and by failing to demonstrate the prospect of contrary sustainable evidence to be called at the hearing.[2]

[22] The Appellant O'Connell's affidavit makes no mention of any future expert evidence, but instead indicates that he will rely on the affidavit of Ms. Stern, in which she opines that Windmill's OPA and ZBA applications conform to the City's OP, represent good planning, are in the public interest, and that subpolicy 12.3(1)(j) "which sets out requirements for the content of a planning rationale supporting an area-specific OPA, is not a determinative policy and cannot be read in isolation."

[2] *2665100 Ontario Inc. Toronto (City)*, 2023 CarswellOnt 2896 (OLT), paragraph 34.

[23] The Appellant Glass asserts in his affidavit that he has been actively but unsuccessfully trying to retain a professional planner and a traffic engineer to prepare expert evidence on the two issues he has raised in his appeal. His affidavit evidence is particularly not probative on two points: (1) that at no point did any of the seven professionals he sought to retain advised him that “my grounds of appeal were unfounded”; and (2) that one non-identified planner he contacted, and whose qualifications are unknown, allegedly agreed with his interpretation of subpolicy 12.3(1)(j) of the City’s OP. The Appellant Glass acknowledges that he has been following Windmill’s application before September 27, 2023 when the City approved the OPA and the ZBA. He recognizes that he hired his legal counsel before then as well. Yet, many months later, after filing his appeal and being served with Windmill’s potentially very consequential Motion to Dismiss, he still has failed to advance persuasive evidence that he has any prospect of retaining one or both expert witnesses, while admitting that he “understand[s] the importance of providing this type of expert opinion to the Tribunal.”

[24] In choosing not to file responding affidavit expert evidence, the Appellants did so at their peril.[3]

[25] The grounds of appeal are very narrow. There is no dispute as between the Parties that the approved OPA and ZBA have regard to matters of provincial interest pursuant to section 2 of the Planning Act and are consistent with the Provincial Policy Statement (2020) pursuant to section 3 of the Planning Act. The affidavit evidence of the two experts in land use planning, Ms. Stern and Mr. Harte, support these conclusions. This thus leaves two questions for the Tribunal to consider: (1) does the

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[3] *Bacher v. GR (CAN) Investments et al.,* 2022 CarswellOnt 7466 (Ont.DivCt), paragraph 40; *Calloway REIT (Whitby NE) Inc. v. Whitby (Town),* 2020 CarswellOnt 18046 (LPAT), paragraph 15.

challenge based on policy 12.3(1)(j) disclose an apparent planning ground upon which the appeal could be allowed; and (2) does the challenge based on the traffic study data disclose an apparent planning ground upon which the appeal could be allowed.

Does the challenge based on subpolicy 12.3(1)(j) disclose an apparent planning ground upon which the appeal could be allowed?

[26] The first ground of appeal raises the issue of how official plans, and the City's OP in particular, ought to be interpreted.

[27] Windmill submits that subpolicy 12.3(1)(j) of the City's OP sets out what an applicant must address in a planning rationale and are not factors that are determinative of the application for an OPA. The affidavit evidence before the Tribunal clearly establishes that the planning rationale submitted by Windmill did consider all the factors enumerated in policy 12.3(1), including subpolicy 12.3(1)(j).

[28] By contrast, the Appellant O'Connell asserts that subpolicy 12.3(1)(j) of the City's OP is a mandatory requirement and that alleged non-compliance with that requirement made the Windmill's amendment application non-conforming to the City's OP.

[29] Through the affidavits, there was a range of evidence about distance between the Subject Property and the rapid transit station. Mr. Moser stated in his affidavit that the existing Lincoln Fields BRT Station is located within approximately 300 metres and a 10-minute walk of the Subject Property. Ms. Stern stated that her "best estimate" of the distance, measured to the centre of the platform, is 450 metres. However, she noted that station connectivity plan is still in draft form and that active transportation connections to the station have not been finalized or constructed.

Thus, for her, there is some variability in how this measurement is estimated. The pathways are not currently maintained in winter. However, she explained that the plans are not yet in place for winter maintenance for these pathways and that a “hold” provision that addresses this matter, amongst other things, is contained in the adopted ZBA.

[30] On the other hand, Mr. Glass’s affidavit states that he attempted to measure the walking distance and that for him the distance is, depending on the route selected and his cadence, either: (1) 907 metres, in 14 minutes and 27 seconds, including 75 seconds of stopped time at a traffic light; (2) 963 metres, in 12 minutes and 13 seconds, including 64 seconds of stopped time; or, (3) 722 metres, in 11 minutes and 35 seconds, including 67 seconds of stopped time.

[31] Despite this diversity of evidence, the Tribunal need not decide what the current or future distance between the Subject Property is to the existing BRT Station or to the future LRT Station to decide whether the Appellants’ first ground of appeal discloses a legitimate planning ground upon which an appeal would have a reasonable prospect of success. The matter can be disposed of through a plain, correct, and reasonable interpretation of the City’s OP.

[32] The Tribunal agrees with Windmill that the first appeal ground does not raise a planning ground.

[33] Firstly, it is now trite law that official plans are not statutes, should not be construed as such, and should be given broad liberal interpretation with a view to

furthering its policy objectives.[4] Moreover, policy 1.4 of the City's OP provides that it is an integrated document, and the OP shall be read as a whole. Therefore, subpolicy 12.3(1)(j) cannot be read in isolation of the remainder of the City's OP. The City's OP articulates broad strategic policy objectives including favouring growth through intensification, directing intensification towards Hubs and Corridors, supporting sustainable transportation and transit-oriented development, and supporting the evolution towards 15-minute neighbourhoods. The Appellants' interpretation of subpolicy 12.3(1)(j) would undermine the need to interpret City's OP to further these and other the broad policy objectives.

[34] Secondly, the requirement pertaining to the contents of the planning rationale is an application requirement and is not determinative of whether the proposal conforms with the City's OP as a whole. Subpolicy 12.3(1) of the City's OP is intended to emphasize factors to be considered in support of an OPA application to establish an area-specific policy. At best, the first ground of appeal might raise a procedural non-compliance (a matter on which the Tribunal is not making a finding). But that would be a process issue rather than a planning ground and would be insufficient to defeat Windmill's Motion to Dismiss.

[35] Finally, the interpretation advanced by the Appellants amounts to converting a procedural requirement at subpolicy 12.1(3)(j) of the City's OP into a firm rule or standard that would bar the City from even considering an application that does not comply with the stipulated distance requirement. If the City intended to make such an extremely consequential prohibition (*i.e.,* that any proposed high-rise development could not occur through an area-specific policy if it was minimally beyond 300-metre

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[4] *Bele Himmell Investments Ltd. v. Mississauga (City)* (1982) CarswellOnt 1946 (Ont. Div. Ct), paragraph 22; *Re Toronto (City By-law No. 438-86*, 2014 CarswellOnt 8511 (OMB), paragraph 17.

radius or 400-metre walking threshold), it would surely have done so expressly rather than indirectly and implicitly in a procedural subpolicy of the City's OP. This is particularly so given that the City's OP applies across the entire City and has a planning horizon over the next 20 to 25 years.

[36] If one follows the logic of the Appellants, no one could even apply for an area-specific OPA to develop a high-rise if the proposed site was minimally over the distance threshold stipulated, such as 301-metre radius or 401-metre walking distance, to a yet to be fully constructed (but fully funded) transit station. It is an absurd result that flies in the face of common sense, and thus an inappropriate interpretation of subpolicy 12.1(3)(j) of the City's OP. The Tribunal finds that any appeal based on such an outlandish interpretation would have no reasonable chance of success and does not constitute a proper planning ground on which the appeal could have success. Thus, the first ground of appeal does not disclose a proper planning ground upon which an appeal could be allowed.

Does the challenge based on the traffic study data disclose an apparent planning ground upon which the appeal could be allowed?

[37] Windmill alleges that the Appellant Glass's second ground of appeal also fails to disclose an apparent planning ground upon which an appeal could be allowed. It argues that it is not sufficient for an appellant to raise a mere apprehension. For Windmill, a mere claim that further expert study is required does not constitute an apparent planning ground on which an appeal can be allowed.

[38] Mr. Harte's professional opinion is that the methodology employed in the preparation of the Transportation Impact Assessment ("TIA') constitutes industry best practices, is consistent with the City's 2017 TIA guidelines, and addresses applicable policies of the City's OP.

[39] By contrast, Appellant Glass's affidavit barely mentions the traffic issue other than his efforts to secure an expert witness, as noted above.

[40] On this second question, the Tribunal agrees with Windmill. The Appellant Glass does not assert that there will be an adverse traffic impact. He merely asserts that more study is required. His extremely brief grounds of appeal fail to identify any specific planning policy shortcoming with respect to traffic. Unsubstantiated apprehensions do not constitute genuine, legitimate and authentic planning grounds worthy of the adjudicative process.[5] Moreover, beyond Appellant Glass's personal non-expert apprehension, he has failed to present the Tribunal with persuasive evidence that he has any prospect of retaining a Transportation Expert who would proffer professional evidence aligned with his position. There is thus a dearth of any evidence that he has raised a legitimate planning ground and a reasonable prospect of success on this issue.

CONCLUSION

[41] The Tribunal agrees with Counsel for Appellant Glass that the threshold to grant a Motion to Dismiss of the type brought by Windmill is high and that dismissal of this type should not be granted lightly. However, for the reasons set out above, the Tribunal finds that Windmill has met the burden of establishing that the appeal grounds do not disclose genuine, legitimate and authentic planning grounds worthy of adjudication.

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[5] *East Beach Community Association v. Toronto (City),* 1996 CarswellOnt 5740 (OMB), paragraph 12; *2665100 Ontario Inc. v. Toronto (City),* 2023 CarswellOnt 2896 (OLT), paragraph 33.

[42] Given that the Appellants have not met their obligation to appropriately raise grounds of appeal that disclose legitimate planning grounds upon which an appeal would have a reasonable prospect of success, their appeals will be dismissed.

ORDER

[43] **UPON APPEALS** to this Tribunal by John O'Connell and William Glass pursuant to sections 17(24) and 34(19) of the *Planning Act*, R.S.O. 1990, c. P.13 against By-law No. 2023-412 and By-law No. 2023-413 of the City of Ottawa;

[44] **AND UPON MOTION** to this Tribunal by Windmill Developments Ltd. for an Order dismissing the Appeals under section 19(1)(c) of the *Ontario Land Tribunal Act*, 2021, S.O. 2021, section 4.6(1) of the *Statutory Powers and Procedures Act*, R.S.O 1990, c. S.22, and sections 17(45) and 34(25) of the *Planning Act*, R.S.O. 1990, c. P.13 and after the hearing of the motion;

[45] **THE TRIBUNAL ORDERS** that the motion is granted and the appeals by John O'Connell and William Glass are dismissed.

"Jean-Pierre Blais"

JEAN-PIERRE BLAIS
MEMBER