

ISSUE DATE:

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PL090551

Ontario Municipal Board
Commission des affaires municipales de l'Ontario

Avenue-Yorkville Developments Ltd. has appealed to the Ontario Municipal Board under subsection 22(7) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended, from Council's refusal or neglect to enact a proposed amendment to the Official Plan for the former City of Toronto to redesignate lands municipally known as 21 Avenue Road from Mixed Use Areas to include site and area specific policies amendment to permit the mixed-use redevelopment on the lands currently occupied by the Four Seasons Yorkville Hotel building
Approval Authority File No. 07 289063 STE 27 OZ
O.M.B. File No. PL090551

Avenue-Yorkville Developments Ltd. has appealed to the Ontario Municipal Board under subsection 34(11) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended, from Council's refusal or neglect to enact a proposed amendment to Zoning By-law 438-86, as amended, of the former City of Toronto to rezone lands respecting 21 Avenue Road from CR (CR T60 C4.5 R6.0 and CR T3.0 C2.5 R3.0) zone to include site-specific zoning by-law amendment to permit the mixed-use redevelopment on the lands currently occupied by the Four Seasons Yorkville Hotel building
O.M.B. File No. PL090552

APPEARANCES:

Parties

Counsel*/Agent

Avenue-Yorkville Developments Ltd.

A. Brown

City of Toronto

S. Bradley

Legislative Assembly of Ontario

O. Pasparakis and
R. Agarwal

DECISION DELIVERED BY S. J. STEFANKO

The Legislative Assembly of Ontario ("LAO") is opposing the proposal by Avenue-Yorkville Developments Ltd. ("Developer") to demolish the existing Four Seasons Hotel at 21 Avenue Road, Toronto and replace it with two point towers set on a three-storey podium. The LAO suggests that the proposal will interrupt the silhouette

of the LAO building (“LAOB”) at Queen’s Park when viewed from University Avenue in a northerly direction and thereby diminish the building’s elegant and prominent setting.

Background

In December 2007, the Developer filed an application for Official Plan and Zoning By-law Amendments for 21 Avenue Road. The purpose of the application was to seek approval to replace the existing Four Seasons Hotel (“Hotel”) with a two tower residential development above a three storey podium. When the application was filed, the heights of the proposed towers to the top of the mechanical penthouse were 221.5 metres on the southerly portion of the site and 186.5 metres to the top of the mechanical penthouse on the northerly portion.

On May 5, 2008 the LAO wrote the City of Toronto (“City”) expressing the concern that the proposal would “impair forever the unique northbound view of the LAOB’s roofline and unique silhouette”. The position of the LAO is that the proposed development should not rise any higher than the existing Hotel which measures 99 metres.

City Planning staff prepared a Preliminary Report (“January 2009 Report”) dated January 19, 2009 for the Toronto and East York Community Council (“TEYCC”). One of the issues identified in this report was the impact of the view of the LAOB. In relation to this issue, the Planning staff identified the need for an objective study (“View Study”) to be completed in relation to the LAOB viewshed and also stated that:

“On 21 Avenue Road, only applications below approximately 136 metres in height (including mechanical penthouse) would be considered.”

City Planning staff also invited the Developer to revise its proposal in accordance with the urban design parameters set out in the January 2009 Report.

In June of 2009 the Developer filed an appeal to the Board citing failure by council (“Council”) for the City to make a decision on its application for an Official Plan and Zoning By-law amendment with respect to 21 Avenue Road.

In December, 2009, following completion of the View Study, the recommendations of which were not adopted by the City, staff prepared another report

("December 23, 2009 Report") for the TEYCC. This report referred to the Developer's May, 2009 revised application wherein the proposed north building was reduced in height to 97 metres and the south building reduced to 143.5 metres. Notwithstanding these changes, the City Planning staff continued to be opposed to the development.

On January 12, 2010, TEYCC adopted the recommendations in the December 23, Report but also requested staff to report directly to City Council on another revised Developer proposal which was presented to the TEYCC at the January 12, 2010 meeting. This revised application ("Final Proposal") reflected a height of 127 metres (including mechanical) for the redesigned north tower and 133 metres (including mechanical) for the south tower.

The Final Proposal was the subject matter of a January 25, 2010 Supplementary Planning Report which went to the City Council. Even though the Developer's proposal had been scaled back significantly from the original 2007 application and was within the 136 metre height window referred to in the January 2009 Report, the Planning staff continued to be opposed to it. Staff's opposition included the impact of the proposal on the viewshed of the LAOB.

At its meetings on January 26 and 27, 2010, City Council did not follow staff recommendations and approved the Final Proposal. Agreement was reached between the City and the Developer and the City appeared at this hearing in support of the Developer's proposal. In addition between January 25, 2010, and the commencement of this hearing, no fewer than eight other parties also settled their differences with the Developer and withdrew their opposition to the development.

In view of the settlements reached and Council's confirmation of the Final Proposal, what I am being asked to approve is the Official Plan Amendment ("OPA") marked as Exhibit 12 in this proceeding and the Zoning By-law Amendment ("ZBA") marked as Exhibit 13.

Issues

This case gives rise to the following issues:

- (1) What is the appropriate view ("View") of the LAOB from University Avenue?

- (2) What is the effect of the proposed development on the View from a planning perspective?

Analysis and Discussion

Issue (1)... View of LAOB

City Planning staff, in the January 2009 Report, took the position that the appropriate view of the LAOB was from the north side of College Street within the University Avenue right of way. At this point, in staff's opinion, visibility above the peak of the connector building immediately east of the centre block of the LAOB was most relevant. The LAO took the position, even though it did not file any visual evidence in this proceeding, that the most relevant views were approximately 80 metres south of College and perhaps, even as far south, as Queen Street. The Developer presented numerous photographs, taken from various points along University Avenue, in an attempt to show what could and could not be seen when viewing the LAOB. Not surprisingly, the Developer argued that the most relevant view was from approximately 60 metres north of College Street. However, during this hearing the Developer did acknowledge the "postcard view" of the LAOB from north of College as suggested by City Planners.

When assessing views and, in particular, the view of the LAOB beyond its silhouette, distance from the building itself is a fundamental and indispensable consideration. For example, if I accept the Developer's position, neither the existing Four Seasons Hotel standing 99 metres high nor the proposed 133 metre south tower would be visible. On the other hand, if I accept the 80 metres south of College position of the LAO, even though the existing Four Seasons could not be seen, the proposed south tower would. The simple fact of the matter is that the further south one is from the LAOB the greater the likelihood that any buildings in the background can be seen.

During this hearing a great deal of testimony focused on what is commonly referred to as the "postcard view" of the LAOB. This is the view taken north of College as suggested by City Planners and one which clearly displays the LAOB in all of its splendour. To the extent there may have been a processional view, as Mr. Stovel

suggests of the LAOB from Queen Street, that view has been altered and compromised by development along University Avenue over the years. Such view compromise is minimized significantly however, by adopting, for purposes of this decision, the postcard view immediately north of College Street (“College Street View”). In my opinion, this is the most relevant view for purposes of dealing with this matter.

Issue (2) – Planning Considerations

In order to address this issue properly, it is necessary to make reference, albeitly briefly to the Growth Plan for the Greater Golden Horseshoe (“Growth Plan”) and then turn to the 2005 Provincial Policy Statement (“PPS”), the *Planning Act* for Ontario (“*Planning Act*”) and the City Official Plan (“City OP”) including the University of Toronto Secondary Plan (“UT Secondary Plan”).

(i) Growth Plan

Essentially, the only evidence in relation to the Growth Plan came from Peter Smith, the planner who provided expert land use testimony in support of the proposal. The basic policy direction of this plan is to concentrate growth in built up areas in locations which provide a focus for transit and infrastructure investments. The site in question is located within an urban growth centre and within a major transit station area, both of which are defined as intensification areas by the Growth Plan. In view of the location of the proposed development and in the absence of any meaningful evidence to the contrary, I share Mr. Smith’s opinion that the proposal conforms to the Growth Plan.

Before leaving the testimony of Mr. Smith some comments are in order regarding the independent nature of the expert planning and architectural opinions proffered by Mr. Smith and Mr. Klewes on behalf of the Developer. The LAO suggests that, in view of the provisions of Rule 4.1.01 (1) and (2) of the Rules of Civil Procedure, the objectivity of the evidence given by Mr. Smith and Mr. Klewes should be questioned. It is true that Mr. Smith and Mr. Klewes have been involved with the proposal for some time. This is not unusual however. Expert planning and architectural evidence in Board hearings is often given by the professionals who are most closely affiliated with the development at issue. In my opinion, such proximity of interest does not, by and of itself diminish the scope, effect or veracity of their testimony. In this case, having heard the testimony of both men and having viewed their demeanour in giving such testimony, I

have no hesitation in concluding that the opinions rendered were ethically principled and that the witnesses genuinely believed their testimony was fair, objective and non partisan. Accordingly, I do not believe there has been a violation of Rule 4.1.01.

(ii) PPS

There is not any material disagreement as to whether the proposal is consistent with the fundamental direction of the PPS which is to achieve efficient development and land use patterns and facilitate intensification. What the parties do disagree on however is the proper application of s.2.6.1 and 2.6.3 of the PPS. These latter sections come into play because of the general language of s.1.1.3.3 which states that “Intensification and redevelopment shall be directed in accordance with the policies of Section 2: Wise Use and Management of Premises...”

Section 2.6.1 of the PPS provides that “Significant built heritage resources and significant cultural heritage landscapes shall be conserved”. The Developer concedes that the LAOB is a significant built heritage resource and that Queens Park is a significant cultural heritage landscape but disagrees with the interpretation placed on the word “conserved” by the LAO. In the PPS, “conserved” is defined as follows:

“Conserved: means the identification, protection, use and/or management of cultural heritage and archaeological resources in such a way that their heritage values, attributes and integrity are retained. This may be addressed through a conservation plan or heritage impact assessment.”

The LAO argues that the proposal compromises the view of the LAOB from the south and, as a result, the heritage values, attributes and integrity are not being retained. I do not agree; not because the background to the view cannot be characterized as an attribute, but rather because the interruption of the silhouette of the LAOB as reflected by the photographs at pages 14-17 of Exhibit 4 in this proceeding, is barely discernible. These photos are taken from the north side of College Street going across the University Avenue right-of-way and clearly demonstrate that the interruption is only modestly visible from a very small aperture of University Avenue and only when leaves are not on the trees which are in the viewshed of the LAOB. According to the evidence presented, these trees could live for another 100-150 years. Within the

foregoing context, the level of intrusion of the proposal on the silhouette of the LAOB, is in my opinion negligible. I am therefore led to the inescapable conclusion that the proposal is consistent with the policy consideration set out in s.2.6.1 of the PPS.

The LAO also argues that the proposal is not consistent with the provisions of s.2.6.3 of the PPS. The relevant portion of that policy reads as follows:

“Development and site alteration may be permitted on adjacent lands to protected heritage property where the proposed development and site alteration has been evaluated and it has been demonstrated that the heritage attributes of the protected heritage property will be conserved.”

The operative part of this provision is the phrase “adjacent lands” and fortunately, the definition section of the PPS provides guidance as to what this means. The definition of adjacent lands for purposes of s.2.6.3 reads as follows:

Adjacent lands: means

(b) for the purposes of policy 2.6.3, those lands contiguous to a protected heritage property or as otherwise defined in the municipal official plan.

When one proceeds through this definition and its potential application, the following conclusions can be drawn:

- (i) clearly the site in question is not contiguous to the LAOB; and
- (ii) The City OP does not otherwise define the phrase.

As a result, even if one assumes that the LAOB is protected heritage property, the proposal is simply not adjacent in accordance with the definition. It follows therefore that policy 2.6.3 does not apply. Again, I accept the planning evidence of the Developer.

(iii) Planning Act (“Act”)

The LAO raised the application of s.2(d) of the *Planning Act* and argued that the LAOB is a matter of provincial interest which is to be conserved. In that regard, reference was made to a letter (“OHT Letter”) from the Ontario Heritage Trust dated April 17, 2008 which, according to the LAO, stated that the preservation of the current

skyline behind the LAOB is a matter of provincial interest. The argument advanced by the LAO is not convincing for a number of reasons. First, s.3(1) of the Act gives the Minister the ability to issue policy statements on matters relating to municipal planning that are of provincial interest. In the case before me, no such policy statement has been issued. Second, under s.22(11.1) and s. 34(27) the Minister may declare a matter of provincial interest by notifying the Ontario Municipal Board of such interest at least 30 days before a hearing. Again, in this case, no such notification has occurred. Third, the author of the OHT Letter simply stated a belief as to provincial interest, not an unqualified categorical assertion. I would also note that I am unaware of any legislation which gives the Ontario Heritage Trust the authority to declare provincial interests. And lastly, neither s.2(d) nor any other provision of the Act provides any definition or explanation as to what is meant by the phrase “conservation of features of significant architectural, cultural, historical, archaeological or scientific interest”. In summary therefore, a case has not been made out that the view of the LAOB is a matter of provincial interest. Even if I am wrong in this conclusion, I am satisfied, for the reasons expressed earlier in this decision with respect to the PPS, that the proposal does not conflict with s.2(d) of the Act and that City Council, when it approved the Final Proposal, did indeed have regard to s.2(d).

(i) City OP

(a) Public Realm and Heritage

Even though the UT Secondary Plan is part of the City OP, the Secondary Plan merits separate treatment in these reasons and I will therefore discuss it under its own heading. This portion of my decision will focus on what I believe are other salient features of the City OP.

It is understood that the subject site is located in the Downtown area of the City and that section 2 of the City OP outlines the importance of the Downtown as one of the areas where growth should occur. The LAO argues however, that the Proposal is not in conformity with the Public Realm Policies in 3.1.1.8, 3.1.1.9 and 3.1.1.10 or the Heritage Policies in 3.1.5. According to the LAO, these policies underscore the need for insuring

that no building should be even remotely perceptible in the viewshed of the LAOB looking in a northerly direction from University Avenue. I do not agree.

In policy 3.1.1.8 for example, the focus of the policy appears to be on “scenic routes” and it is these routes which are to be preserved. There is no mention of a particular view or designated view. And in 3.1.1.9, the emphasis is on maintaining a public view. There is no definition of a public view and certainly no mention of a backdrop or view silhouette. In policy 3.1.1.10 reference is made to the siting and development of public buildings. There is no mention of private development and its potential impact on viewsheds of public buildings. The lack of policy detail with respect to view backdrops or view silhouettes is indeed conspicuous by its absence.

This lack of policy specificity continues in Section 3.1.5 of the City OP dealing with Heritage Resources. Policy 3.1.5.2 states that heritage resources on properties listed on the City’s Inventory of Heritage Properties will be conserved and development adjacent to this Inventory will respect the scale, character and form of the heritage buildings and landscapes. The words “conserved” and “adjacent” are not defined however. When I attempt to discern the appropriate meaning attributable to these words it is, in my view, reasonable to interpret these words to have the same meaning as defined in the PPS. On this basis, the proposal, which is almost 1 Kilometre away, from the LAOB, could not be considered to be “adjacent” to the LAOB.

This lack of policy specificity in the City’s OP in relation to backdrops or silhouettes is accentuated when OPA 98 is taken into account. This amendment was enacted by City Council on December 7, 2009 and deals with land immediately across from the subject site on the west side of Avenue Road. When referring to the Institutional Precinct, being land between Madison Avenue and Avenue Road, this amendment was very specific. It stated that development in this precinct will:

“Respond to key views and locations, avoiding encroachment into the viewshed of significant buildings. In particular, no building will interrupt or rise above the silhouette of the Ontario Legislative Building at Queen’s Park, when viewed from University Avenue, subject to a view corridor analysis completed to the satisfaction of the City.” (Board emphasis added)

In my estimation, OPA 98 illustrates very clearly that the City, when it chooses to do so, will not hesitate to implement height and view limitations on development to

protect the LAOB silhouette. Such limitations however have not been adopted for 21 Avenue Road. My role in this process is to implement policy, not create it.

Lastly, I believe it is worth noting that applicable guidelines reinforce the proposal and its conformity to the City OP. The Bloor-Yorkville/North Midtown Urban Design Guidelines provide guidance with respect to height yet do not restrict heights in order to preserve the backdrop of views of the LAOB. Additionally, neither the Built Form Guidelines nor the Tall Building Guidelines address the matter of the backdrop to views of buildings such as the LAOB.

(b) UT Secondary Plan

The LAO argues that since the LAOB is within the boundary of the UT Secondary Plan, its policies apply to prevent any development which impacts the views of the LAOB. In my opinion the plan and specific language of the UT Secondary Plan provides direction as to whether the Plan's policies apply to the proposal. The first section in the Plan reads as follows:

- 1.1 The following policies and principles apply to the University of Toronto Area , as outlined on Map 20-1.

Simply put, when one looks at the boundary of the University of Toronto Area ("UTA") on map 20-1 it is visibly evident that 21 Avenue Road is not within the UTA.

The second provision which assists in determining whether the Secondary Plan applies to the proposal is Section 3 which is titled Structure, Form and Physical Amenity. It reads as follows:

"This Section and Maps 20-2, 20-3 and 20-4 constitute a 'Structure Plan' which sets out the most important aspects of the built and landscaped environment that will be preserved, protected and enhanced in any development project in the University of Toronto Area. These maps also show how improvements could be made over time to enhance the identity, utility and ambiance of the Area. To permit development or in approving public works within or adjacent to the University of Toronto Area, the following structuring elements of the University of Toronto Area will be considered."

The first sentence of this provision is again, very clear, as to its application. The area affected by any development project is the UTA and only the UTA. However, some confusion regarding application of the Section is created in the last sentence when, as Mr. Gladki testified, the words “to permit development” must be read in concert with the phrase “within or adjacent to the University of Toronto Area”. I do not accept Mr. Gladki’s interpretation for two reasons. First, such an interpretation is inconsistent with the clear and unambiguous language of Section 1.1 and the first sentence of Section 3.3. Second, Mr. Gladki’s opinion would have more resonance if the word “and” had been used instead of the word “or” between the phrases “permit development” and “in approving”. It was not.

Having concluded that the UT Secondary Plan does not apply to the subject site, it is unnecessary for me to assess the position of the LAO with respect to Policy 3.2.1 of the Secondary Plan but in the interest of completeness I will do so. The relevant portion of this policy reads as follows:

“The preservation and enhancement of the existing series of unique, important and memorable views within, at the edges of and into the University of Toronto Area from the surrounding areas as indicated on Map 20-4 will be encouraged through appropriate built form and landscape controls.”

The LAO argues that based on the language of this Policy, the preservation of views is to be considered from the surrounding areas and that the LAOB backdrop is to be protected. Again, I do not agree. Policy 3.2.1 refers to views “from the surrounding areas”. As I mentioned earlier in these reasons, the most relevant and most appropriate view of the LAOB is the College Street view. On map 20-4, the area north of College is within the University of Toronto Area and not outside. The College Street View is therefore not “from the surrounding areas”. When reviewing the Secondary Plan policies it is apparent, yet again, that there is no specific policy which addresses the backdrop of view to the LAOB from the south either on lands within the Secondary Plan or lands beyond it north of Bloor Street West. Area-Specific Policy 211 is the specific policy which applies to the Bloor Yorkville/North Midtown Area and to the subject site. If the City wanted to restrict heights on the site in order to preserve the backdrop of views of the LAOB, logic dictates that such policies would have been included in this section. No such policies are part of Area Specific Policy 211. Accordingly, even if I am wrong,

and I do not believe I am, in my conclusion that the UT Secondary Plan does not apply to the subject site, Policy s.2.1 does not prevent the proposal from going forward.

To summarize therefore, I do not accept the arguments made by the LAO in relation to the Official Plan. When I dissect those arguments and take into account the planning evidence of the Developer, I am quite satisfied that the proposed development is in conformity with the City OP.

Before concluding my Analysis and Discussion, some brief comments regarding the evidence of the Participants is in order. There were six individuals who came forward, either in their personal capacity or on behalf of a ratepayer group. They too were opposed to the proposal and supported the LAO position. Essentially their evidence mirrored the evidence presented by the LAO except for the testimony of Mr. Baldwin. He pointed out that due to his physical condition he required care on a regular basis and that construction of the new towers may very well create serious problems in relation to his daily existence. He requested that, during construction, the Developer provide him, at the Developer's expense, with alternate accommodation to avoid any difficulties during construction. I am not convinced I have the authority to make an Order of the type Mr. Baldwin suggested, but even if I do have such authority, under the circumstances of this case, making that Order would, in my view, place too onerous an obligation on the Developer and would, therefore, be inappropriate.

Conclusion

In matters of the type this hearing presented, s.2.1 of the *Planning Act* comes into play. The provision requires that I have regard to decisions of council. In this case City Council approved the proposal in question. The Divisional Court in Ottawa (City) v. Minto Communities Inc. [2009] O.J. No. 4913 provided direction as to what "have regard to" means. In paragraph 33 of that decision Aston J. stated:

"The words "have regard to" do not by themselves suggest more than minimal deference to the decision of Municipal Council. However, in the context of the Planning Act, and balancing the public interest mandates of both the Board and the municipality, I would agree with Member Stefanko in Keswick Sutherland that the Board has an obligation to at least scrutinize and carefully consider the

Council decision, as well as the information and material that was before Council.”

When I review all of the evidence, and the Final Proposal approved by Council, I am simply not persuaded that City Council’s decision in this matter was wrong. That conclusion is further reinforced by the position adopted by the Minister of Culture in January of this year which cannot be overlooked. In response to a Toronto Star editorial relating to the proposal and the LAOB, the Minister, stated in part:

“The buildings proposed for Avenue Road north of Bloor St. are not the first, nor likely will they be the last. Development of this vital portion of the City centre will be determined by the planning decisions of the City of Toronto.

The silhouette is not pristine nor is it imperative to the heritage preservation of the Legislative Building that it be so. Viewshed is only one of many considerations in heritage preservation. The Legislature is well defined by the wide boulevard of University Avenue for many blocks to the south and well protected by the parkland and open portion of University Avenue to the north.”

Based on all of the foregoing, the proposal in my view, is consistent with the PPS, does not offend any provisions of the Planning Act and conforms with the Growth Plan and City OP. Accordingly the ZBA and OPA are hereby approved. Any minor modifications or corrections may be made to such documents if agreed to by the City and the Developer. The Order with respect to this decision shall be withheld until a section 37 agreement has been executed by the City and the Developer and the City has advised the Board accordingly.

“S. J. Stefanko”

S. J. STEFANKO
MEMBER