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PL090733

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Ontario Municipal Board
Commission des affaires municipales de l'Ontario

1540 BSW Development Inc. 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 1540 Bloor Street West from Mixed Commercial Residential (MCR T3.0 C1.0 R2.0) zone to include site-specific zoning by-law amendment to permit the development of a mixed-use building
OMB File No. PL090733

1540 BSW Development Inc. has referred to the Ontario Municipal Board under subsection 41(12) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended, determination and settlement of details of a site plan for lands respecting 1540 Bloor Street West, in the City of Toronto
OMB File No. PL09734

APPEARANCES:

Parties

1540 BSW Development Inc.
City of Toronto

Counsel

A. Brown
S. Bradley

DECISION DELIVERED BY S. J. STEFANKO AND ORDER OF THE BOARD

1540 BSW Development Inc. ("Developer") has appealed its Zoning By-law amendment and Site Plan control application ("Applications") to redevelop property at 1540 Bloor Street West, as a result of City of Toronto ("City") Council's ("City Council") failure to make a decision on the Applications within the time prescribed by the Planning Act.

Background

The Developer is the owner of property at the north-west corner of Bloor Street West and Dundas Street West in Toronto. The lot in question has frontage along Bloor Street of 31.02 metres, a depth of 41.77 metres and an area of 1365 square metres.

It currently accommodates a two-storey mixed use building along Bloor Street with commercial uses on the ground floor and apartments above. The Developer seeks to demolish the existing structure and replace it with a 27-storey building. This building, including its mechanical penthouse, would be 92.5 metres high. The new structure calls for 258 new residential dwelling units, 1213 square metres of grade related commercial uses, 450 square metres of indoor amenity space and 298 square metres of outdoor amenity space. A five level underground parking garage will provide for a total of 190 parking spaces and a total of 194 bicycle storage spaces will also be provided.

The current zoning by-law ("MCR Zoning") permits a combined residential and non-residential density of 3.0 times the lot area and a height limit of 16 metres. The proposal contemplates a density of 16.12 times the area of the site and as I have already stated, a total height of 92.5 metres. In terms of uses, the existing By-law 438-86 zones the site Mixed Use Residential. This permits a wide range of residential and non-residential uses, including apartment buildings and retail stores. No amendment to the City Official Plan ("City OP") is required with respect to the contemplated development.

Sequence of Relevant Events

The initial application for the subject proposal was submitted in June, 2007. Since the proposal contemplated development in Mixed Use Areas on Avenues (as those words are defined in the City's OP) and because an Avenue Study as prescribed by the City OP had not yet been done, the Developer was required to have completed what is known as an Avenue Segment Study ("Segment Study"). An initial draft was prepared in July, 2007 and a final study, after consultations with and comments by City staff, was finalized in November, 2007. The Segment Study endorsed the proposal and suggested it would revitalize the area. On December 6, 2007, the City confirmed to the Developer that its development application was complete.

In March of 2008 however, City Council commissioned a Bloor-Dundas Avenue Study ("Avenue Study") which, after significant public input and numerous meetings with affected ratepayers, was completed in September, 2009. Among other things, the Avenue Study recommended mid rise development for the Avenue with an exception for the subject site of a taller building up to 15 storeys in height. This height

recommendation was appreciably less than what the Developer had in mind and was a far cry from the development proposal endorsed by the Segment Study.

Between March 2008 and September, 2009, it became apparent to the Developer that a co-operative dialogue with City officials would not necessarily lead to an approval of the Applications and therefore, appealed the Applications to the Board in August, 2009.

By City Staff Reports, dated October 20 and 22, 2009 respectively, City Staff recommended:

- (i) that the City oppose the Developer’s proposal at the Ontario Municipal Board; and
- (ii) that amendments to the City OP and By-law 438-86 and adoption of Urban Design Guidelines to implement the findings and recommendations of the Avenue Study, be made.

In December, 2009 City Council adopted the staff recommendations and the Avenue Study and passed the Avenue Study By-law (“Avenue By-law”) which limits the height of development on the Developer’s property to 10 storeys and limits the density to 5.5 times the area of the lot. Not surprisingly, the Developer has also appealed the Avenue By-law. Its appeal of the Avenue By-law is however, the only appeal which has been lodged with respect to that By-law. To summarize therefore, the height and density comparisons of the MCR Zoning By-law, the Avenue By-law and the proposal are as follows:

	<u>MCR Zoning</u>	<u>Avenue By-law</u>	<u>Proposal</u>
Height	16 m or 5 storeys	32 m or 10 storeys	92.5 m or 27 storeys
Density	3x	5.5x	16x

As is evident from the foregoing standards, the Avenue By-law is more generous, and arguably, far more generous than the MCR zoning.

Positions of the Parties

The Developer maintains that the proposed 27 storey structure at 1540 Bloor Street West is an appropriate form of development from a land use and urban design perspective. In that regard Robert Glover and Peter Walker provided expert testimony. According to Mr. Glover, the proposal “achieved the provincial and municipal policy goals with respect to intensification” and the “proposed built form and height of development...appropriately addresses the Mixed Used Urban design – related development criteria”. Mr. Walker, the author of the Segment Study, which justified the Developer’s proposal, was equally supportive. In his view, the Segment Study was a relevant stand alone document which identified a number of distinguishing circumstances applicable to the subject site. He opined that the proposal represented good planning and that little or no weight should be given to the Avenue Study.

The City, on the other hand, called Andrea Old, Anne McIlroy, the author of the Avenue Study, Corwin Cambray and Christopher Dunn to provide expert urban design and land use planning evidence in opposition to the contemplated development. They were of the view, inter alia, that the Segment Study was no longer required in view of the completion of the Avenue Study, that the proposal does not harmonize, as it should, the main street character of the area at an appropriate level of intensification and that it undermines the Avenue Study because the 27 storey building is disproportionately large for the site. In their professional opinions, the proper scale of development is as set out in the Avenue By-law.

A number of property owners (“Participants”) from the area also spoke in opposition. The common thread which ran through their testimony was that the development would exacerbate traffic and parking congestion in the immediate vicinity and that a 27 storey building was not compatible with the main street character of the area.

Issues

At the beginning of this hearing I was advised by counsel that a number of matters such as traffic, parking, access, wind, shadowing and replacement of the rental units are no longer matters in dispute between the parties even though the Participants

still voiced reservation regarding traffic, parking and access. In light of the agreements reached between the parties, the issues to be determined by me are as follows:

- (1) Does the Avenue Study and the Avenue By-law, subject to the Developer's appeal rights in relation to this By-law, apply to the proposal?
- (2) Does the proposed development conform with the City OP and with the Growth Plan for the Greater Golden Horseshoe ("Growth Plan") and is it consistent with the 2005 Provincial Policy Statement ("PPS")? It is acknowledged by the Developer ("Developer's Acknowledgement") that failure to conform with the City OP or the Growth Plan or be consistent with the PPS results in the Developer's appeal being dismissed. In other words, the Developer must establish that the proposal conforms with the City OP and Growth Plan and is consistent with the PPS.
- (3) Should a Section 37 Agreement be entered into and, if so, what, if any, should be the payment obligations of the Developer thereunder?

Issue (1) – Avenue Study and Avenue By-law

The Developer argues that because the Avenue Study and Avenue By-law were not in existence at the time the Applications were filed, it would be unfair to take them into account when assessing the Applications. According to the Developer, authority for that proposition is found in the Board decision of Clergy Properties Ltd. V. Mississauga (City) (1996) 34 O.M.B.R 2777. The Board in that case stated at paragraph 15,

The Board, in determining the policy framework under which an application should be examined, has consistently stated that an application must be tested against the policy documents in place at the date of the application. It has done so in order to lend some certainty to the land use planning process.

The Developer submits that the Clergy principle applies to the case at hand, and that I should therefore, adopt it. I do not agree. The Clergy case dealt with a draft plan of subdivision and zoning by-law amendment made under one official plan which was changed by the time the matter went to the Board. That is not the case here. The City's

OP has not changed and in fact, its language is demonstrably clear. Policy 2.2.3.1 states:

Reurbanizing the Avenues will be achieved through the preparation of Avenue Studies for strategic mixed use segments of the corridors shown on Map 2.

The Clergy case is therefore clearly distinguishable from the facts which are before me. However, even if I am wrong in this conclusion, the Avenue Study and Avenue By-law should still be recognized. In that regard, I would adopt the comments of Mr. Krushelnicki in James Dick Construction Ltd. V. Caledon (Town) (2003) O.M.B.D. No. 1195. On page 12 of that Decision he states:

In short the Board is authorized to conclude when it is fair to apply the Clergy principle and should undoubtedly do so in the vast majority of cases. And equally, it has the authority to conclude when the circumstances of a case warrant the application of another principle. For instance, it may choose in its procedural discretion to consider and apply more recent policies and more modern standards that are consistent in a compelling public interest.

To conclude otherwise is to require that current practices and policies, no matter how reasonable, must be ignored or given so little weight as to be made virtually trivial, in all cases where the date of application precedes them. This would amount in some cases to a wilful blindness that would prevent the merits of an application – even where it is reasonable to do so – to apply criteria, standards and tests that are based on the most current research and information.

The Avenue Study was conducted over a considerable period of time with considerable public input. As required by the City's OP, the study engaged, inter alia, businesses and local stakeholders. The compelling language of the City's OP regarding Avenue Studies and their importance in reurbanizing Avenues is the same today as it was when the Applications were filed. In view of that language, the focus of any planning analysis must be on the Avenue Study and, by logical extension, the Avenue By-law. To ignore or reduce the significance of such documents would be a mistake.

Before leaving this issue, some brief comments regarding the City's notice of complete application are in order. The Developer argues, by inference, implication or otherwise, that the notice of complete application sent by the City on December 7, 2007 reflected an acknowledgement by the City that the material filed by the Developer up to that time was satisfactory or was being approved. This conclusion is, in my view, unfounded. The process or act of acknowledging a complete application is not, and

should not, be construed as any type of admission on the City's part that an application is satisfactory to the City in all respects. A notice of complete application means no more than confirmation the application is complete enough to be assessed. In this case, when the Developer's proposal was assessed, it was found to be deficient for all the reasons described by Mr. Cambray in his testimony and in his witness statement.

Issue (2) – Conformity

(i) City OP...Avenues

Notwithstanding Policy 2.2.3.1 which I have already alluded to in these reasons and the existence of an Avenue Study as referred to and required by the City's OP, the Developer argues that Policy 2.2.3.3(b)(i) justifies the proposal and the importance of the Segment Study. This provision reads as follows:

- b) Development in Mixed Use Areas on Avenues, prior to an Avenue Study has the potential to set a precedent for the form and scale of reurbanization along the Avenue. In addition to the policies of the Plan for Mixed Use Areas, proponents of such proposals will also address the larger context and examine the implications for the segment of the Avenue in which the proposed development is located. This review will:
 - i) include an assessment of the impacts of the incremental development of the entire Avenue segment at a similar form, scale and intensity, appropriately allowing for distinguishing circumstances (Board emphasis added)

When I read Policy 2.2.3.3(b)(i) the clear implication of the words "prior to an Avenue Study" in the first line is, in my view, that a segment study is required only if an Avenue Study has not been completed. It is true that, in this case, no Avenue Study existed when the Segment Study was finalized. However, the subsequent completion by the City of the Avenue Study calls into question the need for the Segment Study and therefore, its significance when assessing the planning merits of the proposal. In other words, if a Segment Study is not technically required because there exists an Avenue Study, the issue of distinguishing circumstances may not be relevant. However, in order to ensure that my analysis with respect to Policy 2.2.3.3(b)(i) and the Developer's

position in relation to it is complete, I will assume, for the moment, that the concept of distinguishing circumstances is applicable.

The Developer points to a number of distinguishing circumstances which make the site unique from any other sites along the Avenue segment and accordingly, the development of a 27 storey point tower building would set no adverse precedent for the development of the remaining soft sites within the area. The more salient distinguishing circumstances relied upon are as follows:

- (a) The proposed building is across the road from two 29 storey towers (“The Crossways”) on the northeast corner of Bloor and Dundas;
- (b) The subject site is at the juncture of two major designated Avenues, namely, Bloor Street and Dundas Street;
- (c) The proximity of the site to TTC facilities at Bloor and Dundas which are characterized as a gateway mobility hub: and
- (d) The separation distance between the site and low density neighbourhoods to the north and south by virtue of the subway corridor to the north and Bloor Street to the south.

I am not satisfied that the arguments which have been made to establish the existence of distinguishing circumstances are convincing.

The Crossways when built in the early 1970’s, was permitted as an apartment hotel at a time when the zoning by-law did not have a height limit. In 1973, the City eliminated that loop-hole as a result of developments such as The Crossways. Since then, a development similar to the Crossways has not been replicated. Even if one accepts the proposition that the existence of The Crossways is appropriate justification for the proposed 27 storey structure, I would point out that the lot upon which The Crossways are built is ten times greater than the area of the subject site. If building heights comparable to The Crossways were perceived as desirable or appropriate, the general zoning regulations enacted in 1986 and 1993 would have reflected this desire but they did not. Certain comments set out on pages 36 and 37 of the Avenue Study

aply describe, in my view, the manner in which The Crossways should be viewed from a planning perspective. The relevant passage reads as follows:

Within the surrounding context, The Crossways complex is the exception in terms of building height, massing and relationship to street frontages. It relates poorly to the prevailing character and scale of the Study Area, and as such, exemplifies what is to be avoided in new development. (Board emphasis added).

In terms of location, the site is indeed at the juncture of two major streets. However, a 10 storey structure would also reflect this prominent intersection. It is also in my view noteworthy, that the City's OP does not contain any policy which requires in some way, taller buildings at major intersections.

While it is true that the site is in close proximity to a TTC station this argument doesn't resonate as much as the Developer suggests because there are other sites in the area also in close proximity to transit facilities. Moreover, the argument ignores possible transit infrastructure changes which could be made in the future.

In terms of separation distance from nearby residential development, the Developer's argument has some merit, but it disregards the very important separation distance considerations which must be applied between the subject site and the 2 and 3 storey main street buildings west of the site along Bloor Street. This flaw negates what otherwise might have been a sound argument.

In summary therefore, I am not convinced that the concept of distinguishing circumstances in Policy 2.2.3.3(b)(i) is applicable to the matters before me because of the very language of the Policy: In order for this provision to be relevant, we must have, as the policy stipulates, a development on an Avenue prior to an Avenue Study. What we have in this case is an Avenue Study prior to development. However, even when I assume that the Developer is correct by arguing the application of s.2.2.3.3(b)(i), I am not satisfied a case has effectively been made out in relation to distinguishing circumstances. When I review and assess the arguments made, I am left with the inescapable conclusion that distinguishing circumstances do not exist in a manner sufficient to allow the development to go forward.

City OP..... Built Form

The properties along Bloor Street between Dundas and Keele have a decidedly main street character to them. The lots are narrow, relatively small and, for the most part, have 1-3 storey buildings on them. One of the more relevant Official Plan Policies regarding Built Form is Policy 3.1.2.3(b) which reads:

3. New development will be massed to fit harmoniously into its existing and/or planned context, and will limit its impact on neighbouring streets, parks, open spaces and properties by:
 - (b) creating appropriate transitions in scale to neighbouring existing and/or planned buildings for the purpose of achieving the objectives of the plan;

Although the Developer argues that the proposed building adequately addresses building step backs and is appropriate for the area, I am not persuaded that the level of transitioning contemplated by the City's OP is achieved. The size of the site itself, being approximately 34 metres wide by a depth of 41 metres, severely restricts its ability to accommodate reasonable built form transitions between 27 storeys and existing 2 storey or Avenue By-law as of right 6 storey buildings. When viewing the proposed tower in the various exhibits filed in this proceeding, it is abundantly clear that as it rises over its podium, it appears disproportionately larger and out of scale with adjacent properties to the west. In this regard I cannot help but refer to the commentary set out on page 4-10 of the City's OP which reads:

Development along the Avenues will generally be at a much lower scale than in the Downtown and most often at a lower scale than in the Centres.

What is being proposed is more consistent with the built form in the Downtown and perhaps, even in the Centres. The height and density of this proposal does indeed detract from and undermine the main street character of the area.

For the reasons I have outlined above, the contemplated development, does not, in my view, conform with the City's OP. Having reached this conclusion, it is unnecessary for me, based on the Developer's Acknowledgement, to discuss the Growth Plan or PPS. However, before leaving this issue, some brief comments regarding the potential precedent setting nature of the proposal, if it were approved, would, in my opinion, be appropriate.

The Developer insists that the contemplated development would not, if approved, lead or give rise to similar structures westerly along Bloor Street because no one, other than the Developer, has appealed the Avenue By-law. This argument assumes, incorrectly, that any party who did not appeal the Avenue By-law is somehow precluded from attempting to change it in the future. Approval of the proposal before me would, in my view, provide the motivation necessary to bring, in the future, a zoning by-law amendment application to amend the Avenue By-law and, in turn, could lead to and provide the justification for a building of similar height, mass, density and built form. I agree therefore that approval of the development proposed could indeed be precedent setting.

Issue 3... Section 37 Agreement

In view of my comments and conclusions with respect to Issues 1 and 2, it is obvious that no discussion or analysis is required in relation to a Section 37 Agreement.

Disposition

In the final analysis, the proposed structure of 92.5 metres in height at over 16 times coverage is simply too large for the site and inappropriate for the area. In my opinion, it is not consistent with the findings and recommendations of the Avenue Study, it does not conform with the City OP and it does not represent good planning.

Based on all of the foregoing therefore, the proposed development is not approved and accordingly, the Developer's appeal is dismissed.

It is so Ordered.

"S. J. Stefanko"

S. J. STEFANKO
MEMBER