ISSUE DATE:

January 17, 2013

PL120109

Ontario Municipal Board
Commission des affaires municipales de l'Ontario

IN THE MATTER OF subsection 34(19) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant:	Tony Michel
Appellant:	Gay Stinson
Appellant:	Christoper Zurcher
Subject:	By-law No. By-law 2011-463
Municipality:	City of Ottawa
OMB Case No.:	PL120109
OMB File No.:	PL120109

A P P E A R A N C E S :

Parties	**Counsel**
Gay Stinson and Christopher Zurcher	K. Ross
Tony Michel	
Uniform Developments Inc.	J. Bradley
City of Ottawa	C. Enta

DECISION DELIVERED BY J. V. ZUIDEMA AND ORDER OF THE BOARD

[1] Uniform Urban Developments Inc. (Uniform) made a request to the Executive Chair of the Environmental Land Tribunals of Ontario to review a decision rendered by the Board differently constituted on the above-noted OMB file. The request was made pursuant to section 43 of the *Ontario Municipal Board Act*.

[2] Following her review, the Executive Chair directed that a Motion should be heard to assess the merits of the s. 43 review request. That Motion was brought and heard with Motion and Response materials filed in accordance with the Board's Rules of Practice and Procedure.

RELIEF

[3] Uniform seeks to alter the OMB decision which repealed the zoning by-law and instead seeks that the hearing be adjourned to allow an Official Plan Amendment concerning a Secondary Plan to be processed and if any appeal arises from such Amendment, to permit that appeal to be consolidated with this hearing, and further, to have the original Member continue to hear the matter.

[4] The City of Ottawa, while not having filed formal Response materials, supported Uniform's Motion.

[5] Respondents, Tony Michel, Christopher Zurcher and Gay Stinson opposed the Motion. They argued that the Board's earlier decision should stand as is.

GROUNDS

[6] Uniform argued that the Board violated the rules of natural justice and procedural fairness, acted outside its jurisdiction and made an error of law or fact in rendering its decision.

[7] By way of some history and context of the application, the City of Ottawa passed a by-law to permit the construction of a 14 storey building and a 16 storey building at 335 Roosevelt Avenue (the subject property). Three Appellants appealed the by-law. The Appellants are the Respondents to this Motion.

[8] After a few days into the hearing before the Board earlier constituted, it became apparent that the hearing would take more time than that allotted. Up to that point, the City and the Appellants had put in their case. Uniform had not commenced its case. The Board, in consultation with the parties had in fact, secured additional hearing days some time into the future.

[9] During the initial few days of the hearing, a question arose as to whether an application to amend the Secondary Plan should have been made and accompanied the rezoning. Uniform had relied on the advice of the City of Ottawa (the City) planning staff that no amendment was required. However, because of the dialogue at the hearing and the questions raised by the Board Member, Uniform requested the Board to

hear submissions on a motion on the issue which was characterized as a “threshold issue” in the Board’s disposition.

[10] Uniform believed this would be an appropriate time to argue such a motion given that the hearing would be breaking and resuming at a later time in any event. Uniform maintained that should an Official Plan Amendment (OPA) be required, it could make such an application and request that the resumption of the hearing not occur until any appeal of the OPA could be consolidated and heard with the main hearing. The hearing break would afford time for an OPA, if determined to be needed, to “catch up” with the rezoning appeal. And should an OPA not be needed, then of course, the hearing would resume with Uniform being able to call its case.

[11] The process for hearing such a Motion was arranged and agreed upon by all counsel in advance of it being presented to for the Board’s consideration. Although at the outset, counsel for the Appellants had misgivings and suggested that perhaps the hearing simply continue, she did however argue the Motion after all and suggested that an OPA would be required.

[12] The Motion sought directions from the Board concerning the process to come:

a) The continuation of the hearing at some later time without an OPA; or

b) The continuation of the hearing at some later time consolidated with an appeal of an OPA.

[13] At no time was the repeal of the zoning by-law sought through the Motion.

[14] The Board correctly identified the process for the Motion. The Board states that:

> Counsel for the applicant brought a motion, asking that the latter argument be determined as a “threshold” issue, before calling more witnesses on other subjects. If the Board found OP non-conformity, she said, then her client should immediately apply for an OPA. Counsel for the City agreed to the motion. So did counsel for the neighbours – initially – but later had misgivings; by that point, however, the Board had already agreed. The Board proceeded to hear submissions on the motion, pertaining to that “threshold” issue of OP conformity for height. [Exhibit 1, Tab 5, p.. 2].

[15] Following those submissions, the Board made a determination that an OPA was required. It states “On the motion, the Board finds that the OP does prohibit the height applied for; an OPA would be required.” [*ibid.*]

[16] However further to that determination, the Board then proceeded to assess the merits of the rezoning which included its failure to conform the Official Plan given that an OPA would be necessary. This assessment was done without Uniform having called its case. It is at this point that Uniform argues that the Board went beyond its jurisdiction and violated the rules of natural justice and procedural fairness by making an ultimate determination without hearing Uniform’s case.

[17] Ms. Ross had represented all the Appellants at the hearing but at this s. 43 Review Motion represented Gay Stinson and Christophe Zuercher. She no longer represented Tony Michel who provided his own Response to the s. 43 Review Motion.

[18] Ms. Ross argued that given the Board’s finding that with respect to the rezoning, namely that there was non-conformity with the Official Plan that led to the only logical conclusion that the by-law should be repealed. She relied on s. 24(1) of the *Planning Act* for this argument.

[19] She argued that despite the fact that repealing the by-law was not sought as relief in the “threshold” issue within the Motion, the Board was within its jurisdiction to repeal the by-law if it came to the conclusion that the by-law was illegal pursuant to the application of s. 24(1).

[20] She confirmed that she did not raise the concerns of illegality of the rezoning at the outset of the hearing before the original Member. She also confirmed that at no time did she bring a Motion for Non-Suit. If non-conformity of the zoning by-law was so critical, I am at a loss as to why it was not raised on the very first day of the hearing before the original Member either through opening submissions or via a Motion.

[21] For ease of reference, s. 24 of the *Planning Act* reads as follows:

> 24(1**)** Despite any other general or special Act, where an official plan is in effect, no public work shall be undertaken and, except as provided in subsections (2) and (4), no by-law shall be passed for any purpose that does not conform therewith. R.S.O. 1990, c. P.13, s. 24 (1); 1999, c. 12, Sched. M, s. 24.

Pending Amendments

(2) If a council or a planning board has adopted an amendment to an official plan, the council of any municipality or the planning board of any planning area to which the plan or any part of the plan applies may, before the amendment to the official plan comes into effect, pass a by-law that does not conform with the official plan but will conform with it if the amendment comes into effect. 2006, c. 23, s. 12.

Same

(2.1) A by-law referred to in subsection (2),

(a) shall be conclusively deemed to have conformed with the official plan on and after the day the by-law was passed, if the amendment to the official plan comes into effect; and

(b) is of no force and effect, if the amendment to the official plan does not come into effect. 2006, c. 23, s. 12.

Preliminary steps that may be taken where proposed public work would not conform with official plan:

(3) Despite subsections (1) and (2), the council of a municipality may take into consideration the undertaking of a public work that does not conform with the official plan and for that purpose the council may apply for any approval that may be required for the work, carry out any investigations, obtain any reports or take other preliminary steps incidental to and reasonably necessary for the undertaking of the work, but nothing in this subsection authorizes the actual undertaking of any public work that does not conform with an official plan. R.S.O. 1990, c. P.13, s. 24 (3).

Deemed Conformity

(4) If a by-law is passed under section 34 by the council of a municipality or a planning board in a planning area in which an official plan is in effect and, within the time limited for appeal no appeal is taken or an appeal is taken and the appeal is withdrawn or dismissed or the by-law is amended by the Municipal Board or as directed by the Board, the by-law shall be conclusively deemed to be in conformity with the official plan, except, if the by-law is passed in the circumstances mentioned in subsection (2), the by-law shall be conclusively deemed to be in conformity with the official plan on and after the day the by-law was passed, if the amendment to the official plan comes into effect. 1994, c. 23, s. 16 (2); 1996, c. 4, s. 14 (2).

[22] Presumably it was the later portion of ss. 24(1) to which Ms. Ross referred in her submissions before the original Member, which specifically states “except as provided in

subsections (2) and (4), no by-law shall be passed for any purpose that does not conform therewith." To summarize, it seems that her argument was that the subject by-law should have never been passed because it did not conform to the City Official Plan. And because the original Member determined that there was non-conformity, the by-law should be repealed. She explained that "once the Board reaches the conclusion of non-conformity, then the only option is to repeal the by-law."

[23] This technical reading of the legislation does not take into account circumstances where a by-law can remain. Those are referenced in the exceptions noted under ss. 24(2) and 24(4) as examples.

[24] In any event, the concern of rendering a decision on the merits and substantial to the hearing itself before Uniform had commenced its evidence results in a denial of natural justice and failure of procedural fairness.

[25] The Board seemed to acknowledge that Uniform would be calling its case following the disposition of the Motion. Presumably that is why the Board uses the words that "Counsel for the applicant brought a motion, asking that the latter argument be determined as a "threshold" issue, before calling more witnesses on other subjects." [emphasis added]

[26] If the purpose of the Motion was to determine the threshold issue thereby obviating the need to call more witnesses on other subjects, then that should have been made clear. As mentioned, neither Counsel requested the repeal of the by-law as part of the relief in the Motion before the original Member.

[27] If the Board decided to embark on that remedy in isolation, the parties should have been given an opportunity to respond to that possibility. Further the party with the most to lose, namely Uniform, should have been afforded that opportunity and was not.

[28] There is a disconnect between the Motion brought before the original Member and the ultimate relief granted. Because the determination was outside of what was originally sought, it seems that the Board relied upon the suggestion by Counsel for the Appellants which was presented narrowly: if non-conformity, then only option is to repeal the by-law. There are in fact other options; filing an application for an OPA is one example.

[29] Given these circumstances, I conclude that the Motion for Review should be granted and the relief sought given. Specifically this hearing should continue before the original Member where it left off but with the inclusion of the appeal to Uniform's OPA if launched.

[30] I would add that despite the Motion for Review being brought by Uniform, it seeks to have the same Member continue. The parties opposed to the Motion also agree to have the original Member continue. This leads one to believe that there is full confidence in the original Member's abilities and competence concerning his adjudication of this matter.

ORDER

[31] Therefore the Board orders that the Motion is granted.

"J. V. Zuidema"

J. V. ZUIDEMA
VICE CHAIR