ISSUE DATE:

May 30, 2013

PL121243

Ontario

Ontario Municipal Board
Commission des affaires municipales de l'Ontario

Antorisa Investments 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 neglect to enact a proposed amendment to the Official Plan for the City of Mississauga to redesignate land at the Northwest corner of Hurontario Street and Derry Road West from "Business Employment – Special Site 2" to "Business Employment – Special Site" to permit a motor vehicle repair facility
Approval Authority File No. OZ 11/018 W5
OMB File No.: PL121243

Antorisa Investments 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 neglect to enact a proposed amendment to Zoning By-law 0225-2007 of the City of Mississauga to rezone lands respecting part of Lot 11, concession 1, W.H.S., designated as Parts 1 and 2, Plan 43R-13493 Northwest Corner of Hurontario Street and Derry Road West from "D" (Development) to "E2 – Exception" (Employment) R-1 to permit a motor vehicle repair facility
OMB File No.: PL121244

IN THE MATTER OF section 37 of the *Ontario Municipal Board Act*, R.S.O. 1990, c. O. 28, as amended, and Rule 34 of the Board's Rules of Practice and Procedure

Request by:	1181482 Ontario Ltd.
Request for:	Request for Directions

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

Parties	**Counsel**
1181482 Ontario Ltd.	G. Borean
Antorisa Investments Ltd.	B. Engell
City of Mississauga	R. Kehar

DECISION DELIVERED BY SYLVIA SUTHERLAND AND ORDER OF THE BOARD

[1] The matter before the Board is a motion brought by the Applicant, 1181482 Ontario Ltd. (“118”), to remove the solicitor of record for the Appellant, Antorisa Investments Ltd. (“Antorisa”), namely the firm of Townsend and Associates, from a hearing on an appeal scheduled to be heard on June 24, 2013 which was filed by Antorisa and received at the Board on October 30, 2012.

[2] The basis for the motion is that Townsend and Associates is in a conflict of interest in that it has represented 118 at the Board with respect to the same lands at issue in the upcoming hearing at which Antorisa will be seeking to amend the applicable Official Plan (“OP”) and Zoning By-law (“ZBL”) for a property at Part of Lot 11, Concession 1, W.H.S., at the northwest corner of Hurontario Street and Derry Road West (“subject property”) in the City of Mississauga (“City”) to permit a motor vehicle repair facility.

[3] 118 is the owner of lands at 7091 Hurontario Street, located just north of the subject property. It takes issue with the amendments proposed by Antorisa and has filed an Issues List with the Board. It intends to call both Tony De Cicco, president of 118, and Claudio Brutto, a land use planner, as witnesses at the Board hearing.

[4] The City, also a party in the upcoming hearing, attended the motion hearing but took no part.

[5] 118 alleges that Lynda Townsend, a partner in Townsend and Associates, represented 118 and a related company, Endplex Investment Inc., in a 2005 proceeding before the Board (the “GWL hearing”) with respect to 118’s interest in lands it owned in close proximity to lands it currently owns and the subject property. The GWL hearing related to the City’s decision to approve a proposed plan of subdivision on nearby lands known as the Derrydale Golf Course. The issue of primary concern at the hearing was the cost sharing of traffic lights that had been installed by 118 at Hurontario Street and the Kingsway.

[6] In September 2005, GWL brought a motion to dismiss appeals filed on behalf of Endplex and 118. Ms. Townsend, then a sole practitioner operating out of an office

known as the Law Office of Lynda Townsend Renaud, was retained by Endplex and 118 on September 30, 2005 to represent them at the motion to dismiss, scheduled for October 21, 2005.

[7] During the three-week period, Ms. Townsend was involved in negotiating a settlement between GWL which resulted in Endplex and 118 withdrawing their appeals and GWL paying 118 some share of the cost that 118 had incurred for the construction of the signalized intersection.

[8] Ms. Townsend appeared before the Board on October 21, 2005 to advise of the settlement and the withdrawal of both appeals. The Board's decision was issued on October 26, 2005 and on October 27, 2005 Ms. Townsend completed her involvement with the matter.

[9] 118 now maintains that in order to prepare for the GWL hearing both Mr. Brutto and Mr. De Cicco met with Ms. Townsend and discussed 118's interest with respect to both 118's lands and the future development of the Hurontario Street and Derry West corner and, as a result, Ms. Townsend is aware of significant confidential information with respect to 118's interest as to how adjacent properties should or should not be developed in "this significant area in the City."

[10] In his affidavit, Mr. De Cicco says that both he and his planner, Mr. Brutto, "would be detrimentally affected and put in an inappropriate position if Antorisa's present lawyer would be permitted to cross examine us. This would be an unfair advantage."

[11] It should be noted at this juncture that Antorisa's present lawyer is not Ms. Townsend, but Denise Baker, who has been a lawyer at Townsend and Associates since April, 2012, and has worked for Antorisa on several matters, including the OP and ZBL amendment applications filed with the City for the subject property. She has been active in this particular matter since September, 2012.

[12] In her affidavit, Ms. Baker states that prior to the pre-hearing conference of March 18, where Gerard Borean first raised the issue of conflict of interest, she had no knowledge of her firm ever having acted on behalf of 118. She returned from that hearing and advised Ms. Townsend of the conflict of interest allegation at which point

Ms. Townsend took no further role in the Antorisa file and took steps to secure access to the file so that neither Ms. Baker nor her assistant had any access to it.

[13] Ms. Townsend states in her affidavit that at no time in the course of her 27-day involvement with 118 in 2005 did Mr. De Cicco share any confidential information with her about 118's interest "as to how this significant area in the City" should be developed, nor any confidential information "as to how adjacent properties should or should not be developed."

[14] Ms. Townsend states,

> I am not aware of any confidential plan or development aspiration held by 118 for itself or its neighbours. What I knew was what was set out by Mr. Brutto (118's independent planning consultant) in his affidavit. In fact, had I known that 118 entertained some intentions or position other than what was set out in Mr. Brutto's affidavit; I would not have allowed Mr. Brutto to swear and file an affidavit that was misleading in respect of 118's position.

In other words, Ms. Townsend maintains that any knowledge she had of 118's development plans was knowledge Mr. Brutto shared with the public, and was not in any way confidential.

[15] Ms. Townsend states that she has no relevant confidential information about 118, and that what she knows is disclosed in the motion materials that were before the Board at the 2005 GWL hearing, which she has kept segregated and locked in her office.

[16] Ms. Townsend says in her affidavit that in January, 2012, the firm of Bousfields referred Antorisa to Townsend and Associates in respect to the current matter, and that prior to accepting a retainer from Antorisa, she made an assessment of whether there would be any conflict of interest which would preclude her firm from taking over the matter from Antorisa's previous lawyer, who had withdrawn over a dispute as to whether the lawyer had made written submissions to City Council prior to the adoption of the City's new OP.

[17] She concluded that there would be no conflict since the current Antorisa application and potential issues arising from it were not in any way similar to those in which she was involved in 2005.

[18] Ms. Townsend states:

> There were no common issues and I determined that I had no relevant confidential information from my retainer by 118 that would be even remotely relevant to the Antorisa matter..

[19] She accepted the retainer and negotiated a settlement with the City's solicitor on an issue of party status.

[20] She says,

> In the course of my limited involvement with the Antorisa file, I did not look at or make any use of the information in the 118 file. This was not because I was concerned about a potential for conflict of interest, it was simply because I could not imagine how there would have been anything in the 118 file which would be relevant to the Antorisa file.

[21] Since the resolution of the matter of party status, she has had no further involvement with the Antorisa file, the carriage of which rests with Ms. Baker.

[22] Ms. Townsend makes the following points in her affidavit:

- Ms. Baker has not been provided with access to or any information from the 118 file, which has been kept segregated and locked "even though the motion materials and responding materials were publically filed and could be tracked down through the Board's closed files".
- Ms. Townsend restricted access to the 118 file and any communication regarding the conflict motion.
- Ms. Townsend's assistant does not work for Ms. Baker, and Ms. Townsend has explained to all staff the process for segregating the relevant matters and ensuring confidentiality within the firm.

[23] The leading Supreme Court of Canada case protecting the administration of justice by ensuring that lawyers cannot act on both sides is that of MacDonald Estate v. Martin (1990), 77 D.L.R., (4th) 249 (S.C.C.). The succinct judgement of the Court in this matter was this:

> In determining whether a disqualifying conflict of interest exists, the court is concerned with balancing three competing values: the maintenance of the high standards of the legal profession and the integrity of the judicial

> system; the right of litigants not to be deprived of their counsel without good cause; and the desirability of permitting reasonable mobility in the legal profession. The traditional "probability of mischief" standard is not sufficiently high to satisfy the public requirement that there be an appearance of justice. The use of confidential information is not usually susceptible of proof. Therefore the appropriate test must be such that the public, represented by the reasonably-informed person, would be satisfied that no use of confidential information would occur. This must be the overriding policy that applies, and must inform the court in determining whether a disqualifying conflict of interest exists. Two questions must be answered: (1) Did the lawyer receive confidential information attributable to the solicitor-client relationship relevant to the matter at hand? (2) Is there a risk that it will be used to prejudice the client?
>
> In answering the first question, the American "substantial relationship" test is too rigid. The test should be that, once it is shown by the client that there existed a previous relationship which was sufficiently related to the retainer from which it is sought to remove the solicitor, the court should infer that confidential information was imparted unless the solicitor satisfies the court that no information was imparted which could be relevant. Not only must the court's degree of satisfaction be such that it would withstand the scrutiny of the reasonably-informed member of the public that no such information passed, but the burden must be discharged without revealing the specifics of the privileged communication.
>
> As to the second question, the court should draw the inference that lawyers who work together share confidences, unless it is satisfied on the basis of clear and convincing evid ence that all reasonable measures have been taken to ensure that no disclosure will occur by the "tainted' lawyer to the member or members of the firm who are engaged against the former client. Such reasonable measures would include institutional mechanisms such as "Chinese walls" and "cones of silence." Undertakings and conclusory statements in affidavits, without more, would not be acceptable.

[24] Let us examine the two questions Mr. Justice Sopinka says must be answered in determining whether a disqualifying conflict of interest exists in relation the motion currently before the Board.

[25] First, did the lawyer receive confidential information attributable to the solicitor-client relationship relevant to the matter at hand?

[26] Mr. De Cicco maintains that he shared with Ms. Townsend significant confidential information with respect to both the 118 lands and the future development of the Hurontario Street and Derry West corner, including how adjacent properties should or should not be developed. "Further," he states in his affidavit, "Ms. Townsend is aware

that 118 shall ultimately seek cost sharing (a) contribution from any developer which benefits from the traffic lights constructed and paid for by 118."

[27] Mr. De Cicco also states that, "Ms. Townsend is well aware of confidential information with respect to both my business plans and development plans, all of which shall be at issue in the Antorisa hearing and such information shall be detrimental to 118 and my ability to put forth my case."

[28] Ms. Townsend says that no such confidential information was imparted to her by Mr. De Cicco or Mr. Brutto in 2005 when she was dealing with the issue of cost sharing for the traffic signals. The Board is prepared to accept Ms. Townsend's position in this regard in that there would be no obvious reason why such confidential information would have been transmitted to her given the specific and limited nature of the issue then at hand.

[29] The point made by Mr. De Cicco regarding 118 seeking a cost-sharing contribution from any developer benefitting from the traffic lights constructed and paid for by 118 is hardly a confidential matter, and nowhere does such costsharing appear on the issues list for the upcoming hearing.

[30] An examination of the Issues List does not indicate any connection between this hearing and the 2005 GWL hearing in which Ms. Townsend participated. There is nothing that indicates any overlap with the GWL lands. There is both a new OP and the ZBL in place, and, in general, the issues primarily pertain to intensification for gateway and corridor locations. The Board has difficulty in conceiving how any confidential information that might have conceivably been shared in 2005 would be relevant to the matter at hand in the upcoming hearing.

[31] As to the second of Mr. Justice Sopinka's questions, the Board is satisfied that all reasonable measures have been taken to ensure that no disclosure has or will take place between Ms. Townsend and Ms. Baker. This is not an "undertaking" or a "conclusory statement in an affidavit". Ms. Baker was not aware that Ms. Townsend had acted for 118 in 2005. Once learning that there was a question of conflict of interest, Ms. Townsend immediately established an ethical wall around the files from the 2005 hearing. The files are under lock and key and are not in any way accessible to Ms.

Baker, who has carriage of the case for Andorisa. Ms. Townsend has not herself looked at the files.

[32] The Board also finds it curious that, having made the allegation of conflict of interest at the pre-hearing conference on March 18, 2013, 118 did not pursue a motion date, but rather left it to Ms. Baker to press the Board for a date to be set out of a concern that her client's interests would be prejudiced by having its choice of counsel removed from the proceeding shortly before the scheduled June 24, 2013 hearing. In the meantime, Mr. Borean continued to communicate with Ms. Baker regarding dates for the hearing and outstanding issues pertaining to the procedural order.

[33] While Mr. Borean, counsel for 118, committed to supporting an adjournment of the scheduled hearing should his motion for removal be granted, this still would, in the Board's view, put Andorisa at a potentially costly disadvantage in securing new counsel and that new counsel being brought up to speed with the file. Mr. Engell indicated that he would be available for the June 24th hearing, but would not bring to the scheduled hearing the depth of knowledge or history that Ms. Baker has acquired.

[34] In Sharp Electronics of Canada Ltd. v. Battery Plus Inc., [2000] O.J. No. 2642 (Ont. S.C.J.), Mr. Justice Kennan noted:

> Since the ruling of the Supreme Court in MacDonald Estate, the courts have seen a dramatic increase in the number of cases in which motions are brought to remove counsel from the record. The courts have become more and more alert to the use of "removal litigation" by one party to gain a tactical advantage over its opponent.

[35] The question must be asked, is there genuinely an issue of conflict? In the case before it, and for the reasons given, the Board finds there is not. The Board also finds that every effort has been taken by Ms. Townsend to ensure that one will not arise.

ORDER

[36] The Board orders the motion dismissed.

“Sylvia Sutherland”

SYLVIA SUTHERLAND
MEMBER