

Ontario Municipal Board
Commission des affaires municipales
de l'Ontario



ISSUE DATE: March 19, 2018

CASE NO(S): PL160771

PROCEEDING COMMENCED UNDER subsection 17(36) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant:	100 Broadway Developments Inc.
Appellant:	100 Ranleigh Inc.
Appellant:	117 Broadway Holdings Inc.
Appellant:	1330192 Ontario Inc.; and others
Subject:	Proposed Official Plan Amendment No. OPA 320
Municipality:	City of Toronto
OMB Case No.:	PL160771
OMB File No.:	PL160771
OMB Case Name:	Akbari v. Toronto (City)

Heard: March 2, 2018 in Toronto, Ontario

APPEARANCES:

Parties

Counsel*/Representative

See Attachment 1

**MEMORANDUM OF ORAL DECISION DELIVERED BY GERALD S. SWINKIN ON
MARCH 2, 2018**

[1] This was the third Pre-hearing Conference (“PHC”) regarding this case. It concerns City of Toronto (the “City”) Official Plan Amendment 320 (“OPA 320”), which revises policy in the City Official Plan under the topics of Healthy Neighbourhoods, Apartment Neighbourhoods and Neighbourhoods. Various matters were addressed in this PHC, which will be detailed by topic below.

Status Updates

[2] Further to communications addressed to the Ontario Municipal Board (the “Board”) prior to the PHC and spoken to at the PHC, counsel for Bhushan and Rekha Taneja, Appellant #21, advised that that appeal is withdrawn.

[3] There was also a communication from Russell Cheeseman, counsel to what is referred to as the “Small Builders Group”, who are individuals and businesses collectively given party status (but who are not formal appellants) in the proceeding by way of the disposition of Member Jackson issued on July 4, 2017, and subject to the terms in that disposition. Mr. Cheeseman wrote to the Board on February 27, 2018 to advise that he was no longer counsel of record to that group.

[4] Kelly Matsumoto advised the Board that the City had heard from Amber Stewart to the effect that she would be appearing as counsel of record for at least some members of the Small Builders Group and would advise further. The Board has not yet received any communication from Ms. Stewart but will amend the record to reflect her representation of such members of that group as she will be representing, if that is the case.

Mediation Initiative

[5] As referenced in this panel’s disposition from the second PHC on September 18, 2017, the City has investigated and pursued the possibility of Board-led mediation. Unfortunately, due to the Board’s limited resources and very heavily burdened calendar, the scheduling of any Board-led mediation cannot occur sufficiently in advance of the now fixed hearing date of September 24, 2018, which date no one wishes to sacrifice. However, the City has been exploring with the parties the possibility of mediation led by a private mediator arranged by the City. This may be supplemented by a very short closing phase of mediation in front of a Board mediator, if necessary and capable of being scheduled.

[6] This initiative is still simply the subject of discussion amongst the parties and may or may not occur. The Board leaves that to the City and the Appellants/Parties to deal with.

Procedural Order (“PO”)

[7] Earlier in the week of this PHC, the City circulated first a draft Issues List and then a draft PO, and finally a consolidated draft PO on the day prior to the PHC.

[8] City counsel received some feedback but due to the short notice, the feedback was not universal. The draft PO generally follows the Board’s standard format. Ms. Matsumoto provided some overview comments to the Board on the draft and specifically brought to the Board’s attention certain requests made by John Dawson regarding event target dates. These event target dates were set out as Attachment 4 to the draft in tabular form. The Board canvassed those present and heard no opposition to the adjustments. Accordingly, the Board will now treat these as the revised event target dates. Necessary modifications will be required in the text of the PO as these dates are referenced as so many calendar days before the Hearing date. The Board will leave it up to counsel for the City to synchronize the textual references.

[9] The revised table for Attachment 4 to the PO is as follows:

SUMMARY OF DATES

Date	Event
July 26, 2018	Parties to exchange list of witnesses (names, disciplines and order to be called)

August 24, 2018	Witness statements and expert reports to be exchanged
August 24, 2018	Participants statements to be exchanged
September 5, 2018	Reply witness statements (if any) and evidence outlines of witnesses appearing under summons (if any) to be exchanged
September 14, 2018	Visual evidence to be exchanged
September 24, 2018	Hearing commences

Order of Evidence

[10] Attachment 3 to the PO was proposed as the Order of Evidence. The draft had the Appellants/Parties as calling their cases first, followed by hearing from the Participants and then the case of the City.

[11] The Board expressed concern about this proposed Order of Evidence in this case due to the broad challenges arising from the appeals and the extent of challengers. In this instance, it may be advantageous to the presiding panel, and to all parties involved, if the municipality would lead its case first in order to clearly lay out the nature and substance of the amended policies as adopted, backgrounded by the reasons for the amendment and the planning rationale. With this background, the hearing panel of the Board will have a basis to understand Council's intent and a proper framework to then entertain the challenges to that policy decision.

[12] In some cases, especially where the ground of appeal is narrow, the municipal evidence is called as bare neutral background bereft of any opinion evidence. However, in the circumstances of this case, this panel of the Board is of the view that the evidence should be called in its fullness, as factual and opinion evidence. The evidence would then be tested through cross-examination by parties opposite in interest. And then the City would have the opportunity to call reply evidence to the extent that new matters are raised in the cross-examinations. The Board heard no submissions from counsel opposing this direction.

[13] As the Ministry of Municipal Affairs effected a modification to OPA 320, it is possible that the Ministry may wish to call evidence to address and defend this modification. The Board has no indication of the Ministry's intent at this stage. In order to provide for this contingency, the Board would suggest that the Ministry be shown as following the City in the order of evidence to the extent that the Ministry does elect to call evidence in the proceeding.

[14] By virtue of the fact that there were originally 57 appeals filed against OPA 320 and non-appellant parties added (some appeals having since been withdrawn), despite the fact that many Appellants/Parties are represented by the same counsel, the Board observes that there are likely to be at least a dozen counsel representing Appellants/Parties as well as unrepresented parties who may seek to cross-examine witnesses. Simply allowing unrestricted rights of cross-examination to all could potentially lead to extensive repetition of testimony and unduly encumber and prolong the hearing without advantage. In this vein, the Board has suggested that there be some collaboration amongst Appellant/Party counsel to identify lead counsel, being perhaps two or three counsel, who would lead the cross-examination of the City witness/witnesses and that the balance of Appellant/Party counsel have the right to conduct cross-examination thereafter but confined to matters not taken up by lead counsel or relating to evidence which that counsel intends to adduce through a witness/witnesses which that counsel will be calling.

[15] The PO should make provision for the delivery of a confirmation from the Appellant/Party counsel identifying the lead counsel by some specified appropriate date in advance of the hearing.

[16] In the interest of ensuring an avoidance of undue repetition and encouraging a focused testing of the City evidence, this panel of the Board directs the parties to forge such an approach under the PO.

[17] Ms. Matsumoto also addressed a matter which this panel of the Board proposed to recommend. The policies of OPA 320 fall broadly into two camps, those policies which relate to lands that are in the Neighbourhoods land use designation and those policies which relate to lands in the Apartment Neighbourhood land use designation. A review of the appeals suggests that the appellants broadly fall into one of these two camps.

[18] Accordingly, it would not be inappropriate, and it may indeed facilitate properly understanding the evidence, for these two components of OPA 320 to be effectively called as two cases by the City. The suggestion was that it may be advantageous to start with the Apartment Neighbourhood policies and then hear the Neighbourhoods policies case.

[19] This would result in an internally phased hearing where the City would call its evidence to explain and support the Apartment Neighbourhoods policies. The City witness/witnesses would be subject to cross-examination by the Apartment Neighbourhoods policies appellants/parties. The Apartment Neighbourhoods appellants/parties would call their individual witnesses (and there is an expectation here by the Board that there would be a measure of collaboration and condensation in the number of witnesses who would be called by the appellants/parties), who would be cross-examined by the City. The City would then be entitled to call reply evidence.

[20] This sequence would then start afresh with respect to the Neighbourhoods policies.

[21] Submissions would be reserved for the completion of the evidentiary phase, the Board to hear submissions first from the City and the Apartment Neighbourhood appellants/parties and then from the City and the Neighbourhoods appellants/parties.

[22] In order to control the possibility of undue repetition of appellant/party evidence, again due to the sheer number of such parties, the Board had floated the idea that such witnesses would be limited to one and half hours of testimony in chief. There was pushback on this proposal by counsel with the perfectly legitimate response that, assuming collaboration amongst the appellant parties and the consolidation of evidence through a limited number of witnesses, that fear of the Board was less likely to actually manifest itself. The Board wishes to be plain that it is not seeking to curb or confine any party in the calling of relevant and material evidence. It is simply the Board's observation that on many of the issues here, there is likely to be much common ground amongst expert land use planners and that it is sufficient to hear that opinion evidence potentially three times and not at all necessary to hear it twelve times.

[23] The solution to this potential issue is for the Board to state clearly here that every witness who will be called to testify should complete and file a comprehensive written witness statement that expresses fully and with clarity the witness' position and opinions on the issues being addressed by that witness along with a clear statement of the relevant background being relied upon by that witness as factual underpinning for the opinion evidence.

[24] However, when that witness is providing his, her or their oral testimony at the hearing, it shall be the duty of counsel and that witness to generally adopt the testimony of prior witnesses on those issues and matters where there is a unanimity of view, subject to any necessary qualification or elaboration to convey nuance or critical variance from the evidence of the prior witness(es).

[25] In aid of ensuring that all parties are aware of the intended flow of the hearing, the Board also directs that lead Appellant counsel for each of the two camps consult with the other Appellant/Party counsel in their camp and establish a sequence of

Appellant/Party witnesses. The list of witnesses to be called and the sequence in which they will be called will be provided by lead counsel to all parties two weeks prior to the commencement of the hearing.

[26] Finally, there is a further adjustment which will be required to the Order of Evidence. Following the case of the City in each category (and that of the Ministry to the extent that it intends to call evidence), provision should be made for the case of the appellant in support of OPA 320, Confederation of Resident and Ratepayer Associations ("CORRA"). It is the understanding of the Board that CORRA is the only appellant in full support of OPA 320, and that this support is of OPA 320 as adopted by City Council, not including the Ministerial modification. The Board is not aware at this stage of the extent of evidence which will be called by CORRA but the Board's direction as to cross-examination should generally be observed as set forth above, all of which will nonetheless be at the direction of the presiding Member. Also, if it is the position of the other resident associations to appear in support of OPA 320, their cases, if they are calling evidence, should be called following the City case as well.

The Issues List

[27] As noted above, prior to the PHC, City counsel circulated a draft Issues List. The draft list had five categories of issues. Especially in light of the discussion at the PHC regarding the internal phasing of the hearing as between the Apartment Neighbourhood policies and the Neighbourhood policies, and having heard the submissions of counsel at the PHC, the Board is of the view that the Issues List should be broken into two categories in keeping with the phases of the hearing.

[28] The draft had a category regarding whether OPA 320 provided an appropriate framework for development in Apartment Neighbourhoods and it had a separate category regarding whether OPA 320 provided an appropriate framework for development in Neighbourhoods. These should be the two categories for the Issues List. The stated issues in the category in the draft with respect to consistency and conformity with the Provincial Policy Framework can be inserted into the aforesaid two

categories and should isolate those provincial policies by section references which are engaged in the review of OPA 320. The Board recognizes that there may be some duplication here.

[29] Similarly, there was a category in the draft regarding the conformity of OPA 320 with the City OP. In reviewing the issues grouped under this category, it appears that many of these issues can logically be attributed to the Apartment Neighbourhood policies and the balance to the Neighbourhoods policies. Having said that, there may be certain issues which cross into both categories and as the Board has indicated with the provincial policy issues, some duplication is warranted and may occur.

[30] The fifth category had one issue, which was whether OPA 320 represented good planning. As this panel advised counsel at the PHC, that question lies at the doorstep of every planning matter which comes before the Board and should be taken as an inquiry inherent to exercise of the Board's jurisdiction. It is not necessary for the purpose of this Issues List to distinguish it as an issue. That question will be spoken to in submissions based upon the evidence heard by the Board.

[31] The Board, thus, requests counsel for the City to revisit the draft Issues List in light of the Board's direction above and circulate the revised list to counsel and the unrepresented parties for comment and ultimate finalization. The Board commends City counsel for including an attribution line following each issue in order to link the issue back to specific appeals.

Site Specific Appeals

[32] As was broached at the last PHC, the primary purpose of the hearing now scheduled for September 24, 2018 is to hear evidence on the broad application of the policy modifications being wrought by OPA 320 and to determine whether those modifications should be approved, modified or rejected in whole or in part. Various appellants did identify site specific issues in their notices of appeal. Although those site specific concerns may emerge in the evidence for this stage of the proceeding in order

to illustrate the effects of the policy modifications, there was an expectation expressed on the part of the City at the prior PHC to treat those site specific aspects of the appeal in a subsequent hearing phase. This was premised on a view that with the general policy determined by the Board, it would then be possible to ascertain any site specific impacts and deal with them accordingly. In certain cases, they may be susceptible of settlement between the appellant and the City and could be brought before the Board on a consent basis.

[33] In order to provide some guidance on the matter of the site specific aspects of appeals and address the expectations of the parties to the proceeding, the Board endorses the approach advanced by the City. This is not meant to preclude site specific settlements at the primary phase of the proceeding if any such are to be brought forward. The panel hearing the appeals will make that determination on such notice as may be required and appropriate.

The Next PHC

[34] At the request of the City and the Parties, the Board was asked to fix a further PHC in order to be in a position to address matters which may arise in the implementation of this disposition and the finalization of the PO. The Board will accommodate that request and the next PHC will be on **Friday, June 1, 2018 at 10 a.m. at:**

**Municipal Board
655 Bay St., 16th Floor
Toronto, Ontario**

[35] The Board expects that there will be a final version of the PO available for issuance arising out of this next PHC, such PO having been circulated to all counsel and parties in advance of the PHC with sufficient time to comment and make any further revisions as may be appropriate. In this regard, the Board expects that the revised draft will be circulated by the City to the other parties at least two weeks before the next PHC and comments thereon forwarded to the City within a week thereafter.

[36] To the extent that there are outstanding issues with the final draft PO, they will be spoken to and dealt with at this next PHC with a view to the Board establishing a final form of PO.

[37] There will be no further notice of the next PHC or the hearing.

[38] This Member will be seized of the next PHC and any intervening case management matters but not necessarily of the hearing.

Collaboration and Respect

[39] On a final note, the Board here wishes to document certain closing comments made by the panel in response to a dynamic which arose during the course of the PHC. The Board's overriding desire is to ensure that the ultimate proceeding will allow for every party to fairly bring before the Board its case, to test the case of those opposite in interest and to finally make submissions to the Board on the evidence adduced.

[40] This is a proceeding involving many parties and, if unmanaged as to procedure, could become unwieldy and thwart the goal of securing a just hearing for every party involved. The goal is more likely to be secured by establishing a protocol and set of procedures which will ensure the conveyance of the positions of the parties in a focused and efficient fashion. Such a goal cannot be secured though by a protocol and set of procedures alone. It requires the cooperation and collaboration of all of those involved in the hearing process. This, in turn, requires the respect of each party for the other and a measure of reasonable accommodation.

[41] Having heard the submissions of counsel during the course of this PHC, the Board perceives that this spirit of respect and collaboration will be present here and will be integral to the smooth conduct of the ultimate hearing. Counsel are well aware of their obligations of civility in these proceedings under the Law Society's Rules of Professional Conduct. The Board believes that those who are not counsel nonetheless can appreciate that their interest will be elevated by maintaining a similar respect in their

dealings with those in the process. Suffice it to say that departures from the norms of respect and civility are noted and do not serve a party's cause.

"Gerald S. Swinkin"

GERALD S. SWINKIN
MEMBER

If there is an attachment referred to in this document,
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Ontario Municipal Board

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ATTACHMENT 1**APPEARANCES:**

<u>Parties</u>	<u>Counsel/Representative*</u>
City of Toronto	Kelly Matsumoto, Nathan Muscat
RioCan Toronto Industry Network, Canadian Propane Association,	Calvin Lantz, Jonathan Cheng
Babak Sarshar, 2462529 Ontario Inc.	Kristie Jennings,
Trans County Development Corp. Conben Holdings	Michael Connell
CAPREIT Ltd.	Johanna Shapira
Leslie Mews Inc.	David Donnelly
BILD	John Dawson
Greater Toronto Apartments Association	Tegan O'Brien for Signe Leisk
Dunpar Developments Holdings Inc.	Mary Flynn-Guglietti
Pabs Ltd. Partnership, Pabs Corporation, Roehampton Apartments Ltd., 1330192 Ontario, Bathurst & Glencairn Square Ltd., Nyx Capital Corp., Yonge Lawrence Dev LP, Worsley Dream Roncesvalles Ltd. Partnership, 200 Keewatin Developments Ltd., Heathwood Homes Ltd., Spadina Towers Inc., 100 Broadway Developments Inc., 117 Broadway Holdings Inc., Salford Investments Ltd.	Joe Hoffman

Minto Communities Canada Inc./ Properties Inc.	John Dawson
Toronto District School Board	John Dawson
90 Eastdale Inc. and 2 Secord Inc./ Preston Group, Parkset Developments Inc., 41 Chatsworth GP Inc., 25 St. Dennis Inc./Preston Group, H-M Apartment Moccasin Inc., 20 Stonehill Inc./Preston Group	Mark Flowers
Graywood Dev'ts, 2419732 Ont. Inc., 2418832 Ont. Inc., I2 Developments Inc., 2397623 Ontario Ltd., 2426684 Ontario Ltd.	Chris Tanzola
Confederation of Resident and Ratepayer Associations in TO	Eileen Denny*
Starlight Group Property Holdings	Mark Flowers