

Ontario Municipal Board
Commission des affaires municipales
de l'Ontario



ISSUE DATE: March 17, 2017

CASE NO(S): PL161031

PROCEEDING COMMENCED UNDER subsection 34(11) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant and Appellant:	Claireville Holdings Limited et al
Subject:	Application to amend Zoning By-law Nos. 438-86 and 569-2013 - Neglect of the City of Toronto to make a decision
Existing Zoning:	Reinvestment Area (Zoning By-law No. 438-86) CRE(x74) (Zoning By-law No. 569-2013)
Proposed Zoning:	Site specific to permit the proposed development
Purpose:	To permit the development of a 56 storey residential building consisting of 583 residential units and the incorporation of 6 existing townhouses within the project.
Property Address/Description:	8-20 Widmer St.
Municipality:	City of Toronto
Municipality File No.:	16 118450 STE 20 OZ
OMB Case No.:	PL161031
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OMB Case Name:	Claireville Holdings Limited v. Toronto (City)

Heard: March 8, 2017 in Toronto, Ontario

APPEARANCES:

Parties

Counsel/Representative*

Claireville Holdings Limited et al.

Michael Melling
Marisa Keating

Widmer-Adelaide Corp. and
Widmer Residences Corp.

Cynthia MacDougall
Brendan Smith
John Dawson

City of Toronto

Ray Kallio

Grange Community Association Max Allen*

**MEMORANDUM OF ORAL DECISION DELIVERED BY GERALD S. SWINKIN ON
MARCH 8, 2017 AND ORDER OF THE BOARD**

[1] The hearing event scheduled for March 8, 2017, was the first Pre-hearing Conference for the zoning appeal filed by Claireville Holdings Ltd. et al. (“Claireville”). Claireville owns the property municipally known as 8-20 Widmer Street, in the City of Toronto (“the Claireville Property”). The Claireville appeal is proceeding before the Ontario Municipal Board (“the Board”) under Case No. PL161031.

[2] Immediately adjacent to the north of the Claireville Property is property owned by Widmer-Adelaide Corp. and Widmer Residences Corp. (“Widmer”), municipally known as 30 Widmer Street and 309-315 Adelaide Street West (“the Widmer Property”). It is situated at the southwest corner of Widmer Street and Adelaide Street West. It too is subject to an appeal to the Board by reason of the City’s failure to make a decision on its zoning amendment application. That matter is proceeding before the Board under Case No. PL151191.

[3] Claireville has party status in the Widmer appeal. The Board understands that Grange Community Association may have Participant status in that matter. That appeal is scheduled for hearing commencing on March 20, 2017, and therefore has not yet started.

[4] On January 23, 2017, the Parties to the Widmer appeal participated in a Board led mediation, the upshot of which was a commitment by Widmer to produce a revised development proposal. This manifested in the service by Widmer on Claireville and the City on February 13, 2017 of revised architectural drawings for its development proposal.

[5] On February 24, 2017, counsel for Claireville served and filed a Notice of Motion returnable before the Board on March 8, 2017, the style of cause of which references both Case Nos. PL161031 and PL151191, clearly evidencing an expectation that the

panel of the Board presiding over the Claireville Pre-hearing Conference would also hear and dispose of its Motion (although counsel for Claireville did not officially secure any confirmation from the Board that he was at liberty to select this date). The Notice of Motion was served on the Parties and the Participant in the Widmer case, being a requirement which would be essential to hearing the type of consolidation motion brought in this instance.

[6] Counsel for Widmer initially raised an objection as to the jurisdiction of this panel to hear the motion. The objection was not pursued and this panel of the Board determined that it did have jurisdiction to hear and dispose of the Motion.

[7] The Notice of Motion set out four specific requests:

1. An Order of the Board consolidating the above-referenced proceedings;
2. An Order of the Board adjourning the Widmer hearing to a fixed date in the fourth quarter of 2017, or earlier if available;
3. An Order of the Board scheduling a Pre-Hearing Conference in advance of the consolidated proceeding in May of 2017; and
4. An Order of the Board directing that notice of the proposed Pre-Hearing Conference be given in accordance with prescribed requirements and the Board's direction.

[8] In response to the Board's question, counsel for Claireville was clear that the second, third and fourth requests were contingent on the order of consolidation and that in the absence of such consolidation, those other requests fell away.

[9] On February 27, 2017, the City communicated to the Board by letter, and by copy of that letter to counsel for Widmer and Claireville, that City staff had come to a tentative settlement with Widmer on their appeal, subject to further discussion to settle

the Section 37 benefits, and that this tentative settlement would be before City Council on March 9, 2017.

[10] Also on February 27, there was a late day exchange of e-mails between Mr. Melling and Ray Kallio. Mr. Melling drew a presumption that the City would not be serving written evidence in the Widmer appeal hearing and sought confirmation on that point. Mr. Kallio responded immediately that the City would not be filing witness statements.

[11] From the record, it is clear that the staff planner at the City who was responsible for handling the Claireville application and the Widmer application was the same individual, George Pantazis.

[12] On March 3, 2017, counsel for Claireville requested that the Board issue a Summons to Witness directed to Mr. Pantazis. The Board issued that Summons on that day. An affidavit of service was filed at the hearing event on March 8 that Mr. Pantazis was duly served with the Summons on March 6 along with the required conduct money. Mr. Pantazis was present in the hearing room on March 8.

[13] Before actually dealing with the Motion, as the purpose of the hearing event was as the Claireville Pre-hearing Conference and as it is the norm to ascertain who is present arising out of that appointment for Hearing, the Board canvassed those present and made a determination of party and participant status. In the result, clearly as the appellant, Claireville has party status, as does the City. Ms. MacDougall indicated that Widmer only sought Participant status in the Claireville proceeding and that status was accorded to Widmer. Grange Community Association requested party status and as this was not objected to by any person, they were accorded party status.

[14] There was a substantial response ("Response") by Widmer to the Motion. The City served and filed a Response to Motion, which essentially relied upon the Widmer Response. Claireville then served and filed a Reply to the Responses. The deponents

of the supporting affidavits, Wendy Nott and Craig Hunter, had not yet been cross-examined on their affidavits but each opposing counsel wished to take that opportunity.

[15] Counsel for Claireville had prepared a proposed order of proceeding in order to deal with this situation. Counsel for Widmer and the City took exception to particular steps in the sequence. In particular, they challenged the right of counsel for Claireville to call Mr. Pantazis as a witness at this hearing event. The Board also had concerns about this step as there was no affidavit of Mr. Pantazis in the filed material and Rule 37 of the *Board's Rules of Practice and Procedure* ("the *Board's Rules*") requires that the facts to be relied upon in the motion hearing are to be set out in an accompanying affidavit served with the Notice of Motion.

[16] Spirited exchanges and submissions followed. As the *Board's Rules* don't explicitly deal with this circumstance, counsel for Claireville relied upon Rule 4 of the *Board's Rules*, which allows the Board to have recourse to the *Rules of Civil Procedure* where appropriate. He then took the Board to Rule 39 of the *Rules of Civil Procedure*, which deals with evidence on motions and applications. The general premise of the Rule is that evidence will be provided by affidavit.

[17] However, subrule 39.03(1), subject to subrule 39.02(2), indicates that a person may be examined as a witness before the hearing of a pending motion or application for the purpose of having a transcript of his or her evidence available for use at the hearing. Subrule 39.03(2) creates a curious opportunity for the party examining the witness as it indicates that the examining party may cross-examine the witness. It allows any other party to cross-examine that witness. It further allows for re-examination, which also may take the form of cross-examination.

[18] Counsel for Claireville volunteered that his method of questioning Mr. Pantazis would be by way of direct examination.

[19] Subrule 39.03(3) indicates that the right to examine shall be exercised with reasonable diligence and that the court may refuse an adjournment of a motion or

application for the purpose of an examination where the party seeking the adjournment has failed to act with reasonable diligence.

[20] In interpreting the *Board's Rules* and the *Rules of Civil Procedure*, it is clear that there is an expectation that the facts to be relied upon are to be marshalled in advance of the return of the motion. In the instance of the proposed dealing with Mr. Pantazis, that was not the case at all. The parties adverse in interest would have had no opportunity to understand what was to be elicited from this witness and would be left to react at the hearing event itself to information that they may or may not have had any knowledge of and ability to make inquiry about or formulate a response to.

[21] Based upon the submissions put before the Board, it appeared to the Board that the purpose of calling and questioning Mr. Pantazis was to pursue the question of "block planning" and the City's willingness to pursue a joint proposal by Widmer and Claireville. In this regard, counsel for Widmer was absolutely clear that although her client had, much earlier in the process, been more than prepared to pursue such an enterprise, at this stage, that was entirely out of the question and that her client was committed to move forward with the settlement struck with the City and to deal with it at the hearing scheduled for March 20, 2017.

[22] As the Board had significant concerns about procedural fairness, and maintaining the spirit and intent of Board Rule 37, the Board declined to allow counsel for Claireville to conduct his examination of Mr. Pantazis and released Mr. Pantazis from further attendance before the Board.

[23] The cross-examinations of Ms. Nott and Mr. Hunter ensued and then counsel, and Mr. Allen, made their submissions.

[24] For the purpose of this disposition, the positions of the Parties in final submissions will be crystallized as they did by way of preface to the full detail of their respective submissions.

[25] Counsel for Claireville urges the Board to order consolidation of the two proceedings on five bases:

1. There are numerous common issues as between the two proposals;
2. There are numerous occasions of common law, policies, guidelines and objectives applicable to both proposals;
3. By reason of the foregoing two points, substantial overlap of evidence that would result from separate proceedings can be avoided;
4. There is the potential for inconsistent decisions of the Board; and
5. His client runs the risk of pre-determination of an inter-related issue adverse to his client's position, being the issue of tower separation.

[26] He challenges the Widmer opposition to the request for consolidation on the basis that although prejudice is alleged due to delay, no material evidence has been led to establish actual prejudice. He stands by the view that the sites share common policies and issues and although Widmer has no heritage resource issue on its site, it is a parcel adjacent to a site with some question of heritage resource and must therefore address that. Further, he suggests that the matter of rental replacement is one, which typically is dealt with after a zoning determination and would therefore not be a significant factor in setting a consolidated hearing date.

[27] In response, counsel for Widmer grounds her opposition to the motion on two main branches:

1. Claireville is too late in bringing this request; and

2. The grounds for consolidation are insufficient. The issues and matters affecting the two sites are different even if the applicable policies are the same.

[28] Counsel for Widmer took the Board through a chronology of the events concerning the two applications and pointed out what she viewed as much earlier appropriate opportunities for bringing this consolidation request, if it was thought to truly be based on some commonality between the applications. Her position is that proximity of the sites alone is not compelling. To underline her point about the lack of commonality, she advises that at this stage, she does not know what the issues of Claireville will be in their own appeal and Claireville has not yet filed any written evidence in the Widmer appeal even though the date for doing so has passed. In her view, it is not efficient for the Board to throw away the two weeks, which have been booked for the Widmer appeal hearing.

[29] And lastly, on the explicit concern expressed by counsel for Claireville regarding tower separation, even though the City Guideline speaks to a 25-metre separation, the settlement with Widmer reflects acceptance of a 20-metre separation. So, the separation issue is very much open.

[30] Counsel for the City submits that the Motion is fatal due to delay. Claireville had the luxury of time to bring this request much sooner and did not, without an adequate explanation. On the point of attempting to advance the consolidation on the basis of block planning, counsel for the City points to the City staff report, which indicates that it cannot work unless the affected owners are willing to cooperate and that Claireville has produced no evidence of that willingness, even to this day.

[31] Mr. Allen was in support of the consolidation as it was his view that comprehensive planning is in the public interest.

[32] After hearing the final submissions, the Board recessed to consider the matter and to compose its reasons for decision. The decision and reasons as delivered orally on March 8 are hereinafter set forth.

[33] The principal request before the Board is the request by Claireville for consolidation. If consolidation is not ordered, the request for adjournment as well as the other requests set forth in the Notice of Motion fall away.

[34] The Claireville position advanced before the Board in the filed material and the evidence and submissions today is that the two sites are proximate and are subject to the same law and policy arising out of the Provincial Policy Statement, 2014, the Growth Plan for the Greater Golden Horseshoe, the *Planning Act* and the City Official Plan.

[35] That is not surprising as the higher level documents affect the whole or significant portions of the Province, the Official Plan affects the City and the King-Spadina Precinct affects the entirety of the lands contained within it. That alone does not constitute sufficient grounds of commonality to warrant a consolidated hearing.

[36] The evidence before the Board is that there is a King-Spadina East Precinct Built Form Study and Public Realm Strategy – Status Update report of August 5, 2014. Its recommendations were adopted by City Council. The recommendations address a number of directions, which are meant to guide City staff in processing development applications. Included in those directions is that applications be evaluated in the context of a block plan for the block in which they sit.

[37] These directions are just that, they are directions. They are not enshrined in official plan policy.

[38] City Staff have articulated the view that block planning is to be encouraged but depends upon the willingness of affected owners to participate in the process. In this instance, City staff discerned that Widmer was willing to participate but that Claireville was not.

[39] The block planning, as envisaged by the direction, as a joint exercise amongst multiple owners and the City, has failed to materialize here.

[40] This, however, does not mean that the applicant owners and the City have forsaken or disregarded comprehensive planning issues in their review of the applications.

[41] The City, subject to endorsement by City Council at its meeting on March 9, has come to terms with Widmer and is prepared to advance a joint position with Widmer at the currently scheduled March 20 Board hearing seeking approval of a revised proposal on the Widmer lands.

[42] The City clearly is of the view that the Widmer site specific appeal can proceed to approval and does not require a resolution of development issues with Claireville.

[43] Claireville is a party in the Widmer Board hearing. It can advance its case in that hearing in terms of comprehensive planning and potential impacts.

[44] This panel of the Board does not perceive that there will be a sufficient economy to be had from consolidating two appeals that involve sites with their own particular features and contexts.

[45] Delay is prejudice.

[46] For the purpose of the March 20 hearing before the Board, as there does not appear to be sufficient commonality of *issues* between these two sites, especially since there is no approved policy which requires joint or block planning across the two sites, the Board dismisses the Motion for consolidation and with it the associated requests for relief.

[47] Following the rendering of the decision on the Motion, as it was then very late in the day, the Board determined that the matters, which would typically be taken up at a

Pre-hearing Conference were better left for another day and canvassed the Parties on that point. There was a consensus that as the Board had already determined the granting of Party and Participant status and that this amounted to a limited number of persons, it would likely be sufficient to convene the following Pre-hearing Conference by way of a teleconference call. As such, the Case Co-ordinator at the Board for the Claireville case will ultimately be in touch with the Parties and the Participant to determine an appropriate date and provide call-in particulars.

[48] So Orders the Board.

“Gerald S. Swinkin”

GERALD S. SWINKIN
MEMBER

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Ontario Municipal Board

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