

Local Planning Appeal Tribunal
Tribunal d'appel de l'aménagement
local



ISSUE DATE: August 23, 2019

CASE NO(S):

PL171210

The Ontario Municipal Board (the “OMB”) is continued under the name Local Planning Appeal Tribunal (the “Tribunal”), and any reference to the Ontario Municipal Board or Board in any publication of the Tribunal is deemed to be a reference to the Tribunal.

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

Applicant and Appellant:	Claremont Development Corporation
Subject:	Application to amend Zoning By-law No. 3037 - Refusal or neglect of the City of Pickering to make a decision
Existing Zoning:	Oak Ridges Moraine Rural Agricultural (ORM-A); Oak Ridges Moraine Village Residential (ORM-R5); and Oak Ridges Moraine Environmental Protection (ORM-EP)
Proposed Zoning:	Site Specific (To be determined)
Purpose:	To permit a 27-lot residential subdivision
Property Address/Description:	5113 Old Brock Road
Municipality:	City of Pickering
Municipal File No.:	A9/90
LPAT Case No.:	PL171210
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LPAT Case Name:	Claremont Development Corporation v. Pickering (City)

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Proposed Zoning: Site Specific (To be determined)
 Property Address/Description: 5113 Old Brock Road
 Municipality: City of Pickering
 Municipal File No.: A17/90
 LPAT Case No.: PL171210
 LPAT File No.: PL171211

PROCEEDING COMMENCED UNDER subsection 51(34) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant and Appellant: Claremont Development Corporation
 Subject: Proposed Plan of Subdivision - Failure of the City of Pickering to make a decision
 Purpose: To permit a 27-lot residential subdivision
 Property Address/Description: 5113 Old Brock Road
 Municipality: City of Pickering
 Municipal File No.: 18T-90016
 LPAT Case No.: PL171210
 LPAT File No.: PL171212

Heard: May 8, 2019 in Pickering, Ontario

APPEARANCES:

Parties

Counsel*/Representative

Claremont Development Corporation	J. Alati* and A. Lusty*
City of Pickering	Q. Annibale* and R. Annibale (Law student)
Regional Municipality of Durham	R. Woon*
Toronto and Region Conservation Authority	S. Heuchert
David Masters	E. Gillespie* and M. Poremba*
Claremont Conservation Group	A. Kern
Claremont District Community Association	J. Laffier

DECISION DELIVERED BY THOMAS HODGINS AND ORDER OF THE TRIBUNAL

INTRODUCTION

Disposition

[1] This Decision provides a written disposition of a decision to dismiss a motion to adjourn brought by Eric Gillespie; dismisses a three-part motion by the Claremont Development Corporation (“CDC”); refuses to provide certain direction and relief sought by the City of Pickering and CDC in Response and Reply; and directs the completion of certain administrative and procedural matters.

Background

[2] CDC appealed the City of Pickering’s (“City”) failure to make decisions on three applications submitted by a previous owner for amendments to the zoning by-law (“ZBL”) and for a draft plan of subdivision for lands at 5113 Old Brock Road North (“Site”). The Site is about 38 hectares (“ha”) in size on the north side of Concession Road 9 (Central Street), between Old Brock Road and Brock Road, in the Claremont area of the City. The Site is referred to as having two parts or phases: Phase I is generally the south-west part of the Site and is about 10 ha in area; Phase II is the balance of the Site.

[3] The evidence indicates that in February 1990 a previous owner of the Site (Toko Investments Ltd. (“Toko”)) applied to the Regional Municipality of Durham (“Region”) and the City, respectively, for a draft plan of subdivision (18T- 90016) and an implementing amendment to the zoning by-law (City File A9/90) for a 27-lot subdivision on the Phase I Lands. Neither the Region nor the City has made a decision on these applications.

[4] The evidence indicates that in 1990 Toko also submitted an application to amend the zoning by-law for the Phase II Lands (City File A17/90). Notwithstanding correspondence from City staff indicating that this rezoning file was closed, the City takes the position that application A17/90 is still “live” and able to be appealed as it has not been decided.

[5] An outstanding question is whether the Phase II Lands are covered by an application for a draft plan of subdivision submitted in or around 1990.

[6] The Decision from the first Pre-Hearing Conference (“PHC”) on the appeals identifies eight Parties [CDC, City, Region, Ministry of Municipal Affairs and Housing (“Ministry”), Toronto and Region Conservation Authority (“TRCA”), Claremont District Community Association (“Community Association”), the Claremont Conservation Group (“Conservation Group”) and David Masters] and multiple Participants. Paragraphs 2, 3 and 4 from said Decision provide relevant background and are as follows:

[2] Applications for Zoning Amendment and Plan of Subdivision were originally filed in 1990 by a previous owner for Phase I lands now designated for residential use within the Hamlet boundary for the Claremont Settlement Area. A subsequent Zoning amendment application was submitted, also in 1990, for the Phase II lands.

[3] Claremont Development Corporation now seeks approvals over the expanded area, thereby giving rise to questions of jurisdiction and the applicable planning policy regime as the original applications predate the current Oak Ridges Moraine Conservation Plan and the Hamlet boundaries.

[4] The Parties have agreed to argue these matters through a Motion to be brought before the Tribunal.

[7] The “expanded area” referred to above in the Decision from the first PHC is the Phase II Lands.

THE MOTION HEARING

Motion To Adjourn

[8] On May 1, 2019 Mr. Gillespie filed a Notice of Motion seeking an adjournment of the Motion Hearing scheduled to begin on May 8, 2019 “...to allow for proper service on all parties and reply(s).” The grounds for the motion include improper service of the motion date on David Masters, the Community Association and the Conservation Group and a resulting insufficient amount of time to review the materials and prepare full responses.

[9] In considering the adjournment motion, the Tribunal heard from John Alati, Quinto Annibale, Mr. Gillespie and Andre Kern and Jennifer Laffier. After taking a short recess to consider the submissions, and with all due respect to Messrs. Gillespie and Kern and Dr. Laffier, the Tribunal orally dismissed the motion to adjourn and, in this regard, this panel adopts the reasoning of then Vice-Chair Zuidema and Vice-Chair Schiller in the following decisions:

Adjournments are not granted by the Board lightly. Considerable time and public funds are used for hearings and hearings should not be adjourned unless exceptional circumstances exist Further the legislation places a positive obligation on those participating in legal proceedings to take reasonable steps to become prepared and be ready for whenever the matter comes to a hearing. This is called doing one's due diligence...Unfortunately simply not being prepared and ready to proceed is not a sufficient enough reason to justify an adjournment. (OMB Case Nos. PL081107 and PL081108, *Chanady, Re*, 2009 CarswellOnt 940); and

The starting point of these Rules [Tribunal Note: The Tribunal's Rules of Practice and Procedure] is that hearing dates are fixed. Requests for adjournments ... are to be based on clear and supportable reasons for why the party seeking the adjournment cannot meet the hearing date and an adjournment should be granted. (OMB Case No. MM150067, *Belletree Real Estate Partners Ltd. v. Toronto (City)*, (2016 CarswellOnt 10981, 89 O.M.B.R. 442).

[10] The following are the key reasons for the Tribunal's decision to dismiss the motion to adjourn:

- A. The adjournment motion was not filed in accordance with the required notice provisions pursuant to the Tribunal's *Rules of Practice and Procedure* ("Rules") and the late filing is not as a result of an unavoidable emergency;
- B. Despite having brought the motion, Mr. Gillespie advised that he was ready, on behalf of Mr. Masters, to proceed and could not identify any Rule that had not been complied with and on which to base an adjournment;

- C. No request or motion for an adjournment was filed in advance of the hearing by either of the two groups referenced in Mr. Gillespie's adjournment motion – the Community Association or the Conservation Group;
- D. Mr. Kern, on behalf of the Conservation Group, advised that he had been served with the Notice of Motion but was unable to respond to the motion within the allotted time. He wanted more time to prepare and submit a response. Mr. Kern did not identify any Rule that had not been complied with in respect to the CDC motion;
- E. Dr. Laffier did not provide any compelling evidence to indicate that the Community Association had not been properly served with the motion date or the Notice of Motion. She indicated how difficult it is for unrepresented groups, with multiple busy members, to respond to matters such as motions. Dr. Laffier did not identify any Rule that had not been complied with in bringing the CDC motion;
- F. A request by a Party wanting additional time to prepare, especially in the absence of a properly filed motion to adjourn, is not a compelling or reasonable ground on which to grant an adjournment; and
- G. At the first PHC, the Conservation Group and the Community Association requested and were granted Party status. Along with such status comes the responsibility to advance and respond to matters in accordance with the Rules except where extraordinary circumstances exist which is not the case here. The Rules establish a process for the filing of motions, responses and reply and there is no evidence that these Rules were not followed.

The Motion, the Responses and the Reply

[11] The motion by CDC is for:

1. An Order that the Proposed Plan of Subdivision includes all of the lands shown in Appendix A, Exhibit 5 to the joint affidavit of Donald Given and Matthew Cory (Tribunal Note: Appendix A, Exhibit 5 includes all of the Site, both the Phase I and the Phase II Lands).
2. An Order of the Tribunal directing the City to circulate forthwith all application materials submitted May 2018, for the purpose of obtaining agency and public comments.
3. Such further and other relief as counsel may advise and the Tribunal may permit.

[12] The motion by CDC is accompanied by a joint affidavit from land use planners Don Given and Matthew Cory ("Given/Cory affidavit"). Messrs. Given and Cory were retained by CDC in 2012, about 20 years after the original applications were filed.

[13] Only two Parties – the City and David Masters – filed Responses to the Motion.

[14] The City's Response to the Motion is:

1. The City does not object to the relief sought by CDC as set out in paragraphs 1 and 2 of its Notice of Motion dated April 18, 2019.
2. The City requests that if the Tribunal grants the relief sought by CDC at Paragraph 2, and orders that the applications be circulated by the City to commenting agencies, that it also issue an Order clarifying the following:
 - a. To what extent does the Clergy principle apply to the applications?
 - b. If the Clergy principle does apply, the applicable policy regime is the one described at paragraph 57 to 66 of the joint affidavit of Donald Given and Matthew Cory sworn April 17, 2019 and filed with the Motion Record of CDC.

[15] The City's Response includes an affidavit from Catherine Rose, the City's Chief Planner. Ms. Rose's affidavit does not provide any evidence or opinion on whether the Phase II Lands are subject to an application for a draft plan or the policy regime applicable to any valid applications.

[16] The Response by David Masters simply says: "David Masters opposes the Appellants' motion for the reasons set out in the Affidavit of Victor Doyle, sworn April 29, 2019." Mr. Doyle's affidavit accompanies the Response.

[17] In Reply, CDC seeks the following relief:

1. A declaratory Order that Mr. Victor Doyle is not impartial.
2. An Order striking the Affidavit of Victor Doyle cited in the Notice of Response of David Masters for lack of an evidentiary or legal foundation upon which the Tribunal could grant relief.
3. Such further and other relief as counsel may advise and the Tribunal may permit.

[18] At the motion hearing, the Tribunal heard submissions from Messrs. Alati, Annibale and Gillespie. The Tribunal also heard from Victor Doyle whom Mr. Alati examined with the agreement of Mr. Gillespie.

ANALYSIS AND FINDINGS

Part 1 of the CDC Motion: Extent of the Plan of Subdivision

[19] Based on the evidence and submissions, the Tribunal dismisses Part 1 of the CDC motion and finds that the extent of the draft plan of subdivision is as set out in Draft Plan of Subdivision 18T- 90016 which proposes to develop 27 lots on about 10 ha - the Phase I Lands. This finding is based on the following:

- A. There is no dispute that an application for a draft plan of subdivision on the Phase I lands was submitted in 1990 as appropriate records exist in this regard including the assignment of an 18T- 90016 descriptor to the application by the Region;
- B. There is no sound or compelling evidence that another application for a draft plan of subdivision was ever submitted for the Phase II Lands.
Further in this regard:
- (i) there are no records from Toko, the previous property owner, showing that a draft plan of subdivision application for the Phase II lands was ever submitted;
 - (ii) there are no records at either the City or the Region which indicate that a draft plan of subdivision application was ever made for the Phase II Lands;
 - (iii) the Given/Corey affidavit says an application for a draft plan on the Phase II Lands "...cannot be found";
 - (iv) a letter from Ms. Rose to Toko dated October 3, 1994, submitted as Exhibit 10, in respect to rezoning application A17/90 for the Phase II Lands says: "An application for a draft plan was to follow. A review of this file finds it is still incomplete as the draft plan of subdivision has not yet been submitted";
 - (v) the May 2014 Claremont Community Working Group Report, submitted into evidence by the Appellants, includes no mention of a subdivision application for the Phase II lands in the portion of its report entitled "Brief History of Property Zoning and Development Proposals";
 - (vi) paragraph 14 of the motion states, in part: "The Application for the

Phase 2 Plan could not be found in the municipal records. No file number appears to have been assigned to it. No records have been found documenting a decision on it”;

- (vii) this Member was involved with development approvals in a local area municipality in the Region for over 20 years and cannot recall during that time a situation in which the record of a properly submitted draft plan of subdivision application went missing or could not be found at the local municipality or the Region; in my experience, both levels of government keep good records in this regard; the fact that neither the City nor the Region has a record of a Phase II draft plan application is telling, especially in light of the fact that the public authorities have records of the other three subject applications; and
- (viii) the dotted or light lotting pattern shown for the Phase II lands in 18T-90016 is for information purposes only, reflecting how 18T-90016 could possibly be integrated with adjacent land, and is not evidence that the Phase II Lands are or were ever subject to a draft plan application; it is common for draft plans to “rough in” with dotted or light lines a possible lotting or road pattern on adjacent lands.

[20] The evidence is clear, layered and conclusive in the Tribunal’s eyes. No draft plan application for the Phase II lands was submitted to the City or the Region.

[21] Further, there was no evidence presented which indicates that a former or current property owner ever properly applied to the City or the Region to amend the Phase I draft plan application to cover all or part of the Phase II Lands or that the City or the Region ever accepted such an amendment.

[22] The Tribunal will not, as requested by Mr. Alati, make an order expanding the

limits of the Phase I draft plan to include the Phase II Lands. Mr. Alati argues that the Tribunal has the power to do this and that the subject case meets certain criteria associated with the making of such an order. He also identifies certain benefits associated with the approval of a draft plan on both the Phase I and Phase II Lands including the amelioration of flooding issues and the provision of additional parkland.

[23] If the Tribunal were to expand the limits of the Phase I draft plan to include the Phase II Lands, it would have the effect of increasing the number of lots in the draft plan from 27 to 71 and the amount of land in the draft plan from about 10 ha to about 38 ha. It would be completely inappropriate for the Tribunal in this instance to triple the size of the draft plan in this way and the Tribunal rejects any notion that such a determination would be fair and reasonable. Notwithstanding the suggested benefits to the broader community associated with a larger draft plan, the Tribunal will not find in the first instance that a draft plan of subdivision for the Phase II Lands was never made and then in the next breath determine that a draft plan - by means of a major expansion of the Phase I draft pan – applies to all of the Phase II Lands.

[24] The authorities provided by Mr. Alati in support of his position that the Tribunal can and should expand the Phase I draft plan to include the Phase II Lands are quite distinguishable from the subject situation and do not involve plans of subdivision. Further, Member Denhez, in a decision on a zoning appeal (*Ottawa (City) By-law No. 2013-29, Re, 2014 CarswellOnt 4521*), outlines certain factors governing the use of riders for geographic expansions and notes that the Divisional Court has affirmed the Board's authority to modify and expand as long as the expansion, amongst other matters, is not to an unreasonable extent. The Tribunal finds that the request by CDC to expand the Phase I draft plan to include the Phase II Lands represents an unreasonable extent.

CDC's Request to Circulate

[25] The Tribunal dismisses Part 2 of CDC's motion which requests that the Tribunal direct the City to circulate forthwith all application material submitted by CDC to the City

in May 2018, for the purpose of obtaining agency and public comments. The May 2018 material includes a draft plan on the Phase II Lands and is not appropriate for circulation because it is not consistent with the Tribunal's ruling on the extent of the draft plan application.

CDC's Request for Further and Other Relief as Counsel May Advise and the Tribunal May Permit

[26] The Tribunal will permit and rule on the matters raised in the Notice of Motion and other closely related matters as set out above. Rule 10.04(b) requires that the content of motion material "state the precise relief sought."

Clergy Principle/Applicable Policy Regime

[27] The City in Response requests that if the Tribunal grants Part 2 of the CDC motion and orders that the applications be circulated by the City to commenting agencies that it also issue an order clarifying the extent to which the Clergy principle applies to the applications and if it does apply, that the applicable policy regime is the one described at paragraphs 57 to 66 of the Given/Cory affidavit.

[28] In respect this request, the Tribunal notes that it is not granting Part 1 or 2 of the CDC motion and, accordingly, is not directing that the City circulate any material.

[29] Further, the Tribunal will not provide direction at this time on the extent to which the Clergy principle applies to the applications or the policy regime applicable to the applications. The following paragraphs explain why.

[30] The Decision from the PHC states that "Claremont Development Corporation now seeks approvals over the expanded area, thereby giving rise to questions of jurisdiction and the applicable planning policy regime as the original applications predate the current Oak Ridges Moraine Conservation Plan and the Hamlet boundaries...The Parties have agreed to argue these matters through a motion to be brought before the Tribunal." This direction was not followed as CDC did not bring a

motion on the applicable policy regime. Rather, the request for Tribunal direction on the Clergy principle/applicable policy regime was raised by the City in Response.

[31] Rule 10.04(b) requires that the content of motion material “state the precise relief sought” and the CDC motion is not precise, by any measure, in respect to requesting direction on the important issue of the applicability of the Clergy principle and the applicable policy regime. It would not be fair or reasonable to adopt a liberal interpretation of the Rules to allow this important issue to be determined at this time and as a result of this particular process.

[32] The Tribunal acknowledges that the Given/Cory affidavit provides evidence and opinion on the applicability of the Clergy principle/applicable policy regime issue, however, that evidence and opinion is not drawn into the CDC motion in any reasonable or informative way. The CDC motion suggests that a determination of the limits of the daft plan is as far as it wanted to go with the Motion, notwithstanding the accompanying affidavit.

[33] The Clergy principle/applicable policy regime question is not an insignificant matter and it should have been properly raised in CDC’s Notice of Motion thereby giving all of the Parties in this proceeding an advisement, at the outset, of the sum of the relief being sought by CDC and the benefit of the full Response period set out in the Tribunal’s Rules. To omit this important issue from the motion and have it raised for direction by a Responding Party is not appropriate, fair or reasonable in this instance, especially given the direction in the Decision from the first PHC, and the Tribunal is not convinced that this approach affords it the best chance for a proper airing and sound determination of the question. Further, the direction requested by the City in its Response involves the determination of a substantial issue and is not simply a “clarification” as suggested at the hearing.

[34] The Tribunal is to be advised how CDC wishes to proceed and how this impacts the Clergy principle/applicable policy regime issue. For instance, does CDC intend to advance the appeal of the zoning amendment that was supposed to implement a draft

plan on the Phase II Lands? If not, can this matter be mediated and settled? Does the CDC intend, if feasible, to now submit a draft plan for all or part of the Phase II Lands? etc.

[35] Mr. Alati indicated at the motion hearing, as noted on page 113 of the transcript, that if the Tribunal was concerned with dealing with the Clergy principle/applicable policy regime issue as part of this motion, that "...it can leave the adjudication of that particular issue to the full hearing." This Member suggests that there may be good reasons and efficiencies in concluding the Clergy principle/applicable policy issue prior to a full hearing. In this regard, the Tribunal notes the City's position in Response that such a determination is warranted prior to circulating the appealed applications to the commenting agencies.

Relief Requested by CDC in Reply

[36] The relief requested by CDC in Reply relates to Victor Doyle. The Tribunal did not rely on Mr. Doyle's affidavit or testimony in making this Decision and, accordingly, it is not necessary to deal with the relief requested in the Reply Motion.

Other Matters

[37] In the interests of expediency and efficiency, this panel identifies the following questions to be addressed in a go-forward plan:

- A. What are the exact applications for which CDC is advancing the appeals and the limits and boundaries of those applications?
- B. Based on A. above, what is the policy regime that applies to the applications now being advanced and to what extent does the Clergy principle apply? When should this determination be made?
- C. Based on A and B above, when is the appropriate time to direct the City to circulate the applications to agencies for comments so that this

information is available to the Tribunal during the adjudication of this case?

- D. Is there any ongoing intent to proffer Mr. Doyle as an expert witness in this case and the resolution of any continuing objections in that regard?
- E. Whether any further material associated with the Clergy principle/applicable policy issue should be required to include a chart describing, at a minimum, each application under appeal, the year the application was submitted, the policy regime in existence at the date of application (including the key designations and policies), any changes to the policy regime (including changes to the key designations and policies) from the date of application to the preparation of the chart and any transitional provisions in the policy documents? The intent of the chart would be to show, in one document, the changes that have been made to the policy regime over time, as well as transition provisions, as an aid to ultimately determining what regime applies.

ORDER

[38] The Tribunal orders as follows:

- A. The CDC Motion, including Parts 1, 2 and 3, is dismissed.
- B. The direction requested by the City in its Response is not provided.
- C. The relief requested by CDC in its Reply is not granted.
- D. CDC is to discuss with the other Parties a potential go-forward plan for dealing with the procedural and other issues in this case and is to submit to the Tribunal by **5 p.m. on Friday, October 25, 2019**, with copies to the other Parties, a recommended go-forward plan and the submission is to identify any areas of disagreement between the Parties in respect to the

recommended go-forward plan. The go-forward plan is to address the matters set out in paragraphs 34 and 37 of this Decision.

- E. The Conservation Group and Community Association are to confirm to the Tribunal's Case Coordinator, Shane Taylor (shane.taylor@ontario.ca), the names, mailing and email addresses and phone numbers of their current counsel and/or representatives by **5 p.m. on Friday, September 13, 2019**.
- F. The Parties and Participants are to receive a copy of this Decision and Order.

[39] This Member is not seized.

"Thomas Hodgins"

THOMAS HODGINS
MEMBER

If there is an attachment referred to in this document,
please visit www.elto.gov.on.ca to view the attachment in PDF format.

Local Planning Appeal Tribunal

A constituent tribunal of Tribunals Ontario - Environment and Land Division
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