

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



ISSUE DATE: January 08, 2019

CASE NO(S): PL180544

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 17(24) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant:	2450 Victoria Park Inc.
Appellant:	Armenian Community Centre
Appellant:	Elad Canada Inc.
Appellant:	Hydin Limited & Fontmil Investments Limited; and others
Subject:	Proposed Official Plan Amendment No. 393
Municipality:	City of Toronto
OMB Case No.:	PL180544
OMB File No.:	PL180544
OMB Case Name:	Armenian Community Centre v. Toronto (City)

Heard: December 11, 2018 in Toronto, Ontario

APPEARANCES:

Parties

Counsel

City of Toronto

A. Hill
G. Szobel

2450 Victoria Park Inc.

D. Bronskill

Armenian Community Centre

M. Flynn-Guglietti
K. Sutton

Elad Canada Inc.	C. Lantz
Hydin Limited & Fontmil Investments Limited	J. Farber
Nuyork Investments Limited, Jarel Investments Limited and Nuber & Dale Construction Limited	A. Platt
Morguard Investments Limited	J. Shapira R. Kehar

DECISION DELIVERED BY SUSAN de AVELLAR SCHILLER AND ORDER OF THE TRIBUNAL

BACKGROUND AND CONTEXT

[1] In 2015, the City of Toronto (“City”) began a planning study of an area slightly larger than the Consumers Road Business Park. The study is known as ConsumersNext and covered an area approximately bounded by Sheppard Avenue East, Victoria Park Avenue, Highway 401 and Highway 404. The study was intended to guide the management of growth in this area. The final phase of the study was the preparation of a Secondary Plan that became Official Plan Amendment 393 (“OPA 393”). The City enacted By-law No. 494-2018 on March 26, 2018, which adopted OPA 393.

[2] OPA 393 was appealed to this Tribunal by 2450 Victoria Park Inc. (“2450”), Armenian Community Centre (“ACC”), Elad Canada Inc. (“Elad”) and by Hydin Limited & Fontmil Investments Limited (“Hydin”). Each of these Appellants assert that OPA 393 is inconsistent with the Provincial Policy Statement, 2014 (“PPS”) and fails to conform with the Growth Plan for the Greater Golden Horseshoe, 2017 (“Growth Plan”)

[3] This is the first Case Management Conference (“CMC”) in this matter, conducted pursuant to s. 33(1) of the *Local Planning Appeal Tribunal Act, 2017*, S.O. 2017, Chapter 23, Schedule 1 (“*LPAT Act*”) and Rules 26.17 to 26.26 of the Local Planning

Appeal Tribunal (“Tribunal”) *Rules of Practice and Procedure* (“Tribunal Rules”).

REQUESTS FOR STATUS

Parties

[4] Requests to be added as Parties to these proceedings were made by Nuyork Investments Limited, Jarel Investments Limited and Nuber & Dale Construction Limited (together “Nuberg”) and by Morguard Investments Limited (“Morguard”).

[5] On April 3, 2018, significant changes to the *Planning Act* and to the Tribunal’s governing legislation came into effect. Now, requests for status to participate in a proceeding such as this one, either as an added Party or as a Participant, must be made in writing to the Tribunal 30 days prior to the CMC. The appeals in these proceedings come under s. 38(1) of the *LPAT Act*. The requirement for the 30 day filing, including content, is set out in s. 40 of the *LPAT Act*:

Participation by other persons, subs. 38 (1)

40 (1) If a person other than the appellant or the municipality or approval authority whose decision or failure to make a decision is being appealed wishes to participate in an appeal described in subsection 38 (1), the person must make a written submission to the Tribunal respecting whether the decision or failure to make a decision,

- (a) was inconsistent with a policy statement issued under subsection 3 (1) of the *Planning Act*,
- (b) fails to conform with or conflicts with a provincial plan; or
- (c) fails to conform with an applicable official plan.

Time for submission

(2) The submission must be made to the Tribunal at least 30 days before the date of the case management conference...

Additional parties

(4) The Tribunal may determine, from among the persons who provide written submissions, whether a person may participate in the appeal as an additional party or otherwise participate in the appeal on such terms as the Tribunal may determine.

[6] Having reviewed and considered the submissions of Nuberg and Morguard, the

Tribunal granted each of them Party status. In doing so, the Tribunal considered three further requirements that inform a decision on a request for party status.

[7] The first of these is also found in s. 40(1) of the *LPAT Act*, set out above. A central element is the required content of the written submission. The required content of a notice of appeal filed under s. 17(24) of the *Planning Act* is set out in s. 17(25)(b) of the *Planning Act*. The content requirement of each of these two sections is similar in that both the written submission for status and the notice of appeal must each address consistency with a provincial policy statement and conformity with a provincial plan. The language of the two sections contains a subtle, but important, difference in the two requirements.

[8] Section 17(25)(b) in the *Planning Act* requires:

Notice of appeal

(25) The notice of appeal filed under subsection (24) must ...

- (b) explain how the part of the decision to which the notice of appeal relates **is** inconsistent with a policy statement issued under subsection 3 (1), **fails** to conform with or conflicts with a provincial plan [emphasis added by the Tribunal]

[9] By contrast, s. 40(1) of the *LPAT Act*, as set out above, requires the person to make a written submission:

...respecting **whether** the decision or failure to make a decision,

- (a) was inconsistent with a policy statement issued under subsection 3 (1) of the *Planning Act*,
- (b) fails to conform with or conflicts with a provincial plan... [emphasis added by the Tribunal]

[10] The use of the word **whether** in the requirement for the content of the written submission for status invites the possibility that requests for status will come from those who take the position that the decision under appeal is consistent with the PPS and conforms with the Growth Plan. Both Nuberg and Morguard support OPA 393 and take the position that OPA 393 is both consistent with the PPS and conforms with the Growth Plan.

[11] The next requirement the Tribunal considered arises from s. 17(44.1) and s. 17(44.2) of the *Planning Act*. These sections set out the criteria to which the Tribunal must adhere when considering requests to add parties to a proceeding that arises from an appeal under s. 17(24).

[12] Section 17(44.1) provides that only the following may be added as parties:

1. A person or public body who satisfies one of the conditions set out in subsection (44.2).
2. The Minister.
3. The appropriate approval authority...

[13] Section 17(44.2) identifies the two conditions to which s.17(44.1) refers:

1. Before the plan was adopted, the person or public body made oral submissions at a public meeting or written submissions to the council.
2. The Tribunal is of the opinion that there are reasonable grounds to add the person or public body as a party ...

[14] Nuberg owns a site within the OPA 393 area, at the southwest corner of Sheppard Avenue East and Victoria Park Avenue. Nuberg was an active participant in the ConsumersNext study and, through its planning consultant, made oral submissions to the City Planning and Growth Management Committee prior to adoption of OPA 393.

[15] The Tribunal finds that Nuberg meets the requirements of s.17(44.2).

[16] Morguard owns properties on Yorkland Road and Yorkland Boulevard within the Business Park Interior District of OPA 393. Morguard made written submissions to City Council regarding the proposed OPA 393.

[17] The Tribunal finds that Morguard meets the requirements of s.17(44.2).

[18] The final consideration arises from Tribunal Rule 8.02 which adds the requirement that, in addition to satisfying:

...any applicable legislative tests necessary to be a party ... [the person or public body's] presence is necessary to enable the Tribunal to adjudicate effectively and completely on the issues in the proceeding.

[19] Given the particular locations of Nuberg and Morguard, the Tribunal finds that their presence will enable the Tribunal to adjudicate effectively and completely on the issues in this proceeding. The Tribunal finds that the addition of Nuberg and Morguard as Parties to these proceedings meets the requirements of Tribunal Rule 8.02.

Participant

[20] A final request for status was made by Enbridge Gas Distribution Inc. ("Enbridge"). Enbridge sought Participant status in these proceedings and met the 30 days in advance filing requirement. Enbridge owns the property at 500 Consumers Road, within the OPA 393 area. Enbridge supports OPA 393 and takes the position that OPA 393 is consistent with the PPS and conforms to the Growth Plan.

[21] The legislative changes that came into effect April 3, 2018 included significant changes to the role of Participants in certain proceedings. Proceedings such as this that arise from appeals under s.17(24) of the *Planning Act* fall under s. 38(1) of the *LPAT Act*. Section 42(1) of the *LPAT Act* restricts participation in an oral hearing to Parties for matters that fall under s. 38(1).

[22] Enbridge advised the Tribunal that it also wished Participant status in the hope that this would enable Enbridge to receive Party status in any mediation of this matter. Enbridge is correct that the Tribunal has, on occasion, granted Party status in a mediation to those who hold Participant status in the adjudicative proceedings. While the Tribunal makes no finding in this matter that would intrude upon the discretion of the mediator, the Tribunal notes that in this new regime for s. 38(1) matters, Participants have a very different – and considerably more restricted – role to play in an oral hearing than they did prior to the legislative changes. Under these circumstances, it may be that Party status in the mediation for Participants in the proceeding of any matter under s. 38(1) may not be appropriate.

[23] Enbridge has indicated that it intends to be in attendance at any future CMCs and at any oral hearing, if that procedure is selected by the Tribunal.

[24] Section 33(2)(b) of the *LPAT Act* gives the Tribunal the power to examine a person other than a Party who makes a submission to the Tribunal regarding the proceeding.

[25] Enbridge has made a submission to the Tribunal. Even as a Participant Enbridge would be available to answer questions from the Tribunal or otherwise be of assistance to the Tribunal. The Tribunal finds that adding Enbridge as a Participant to these Proceedings is appropriate.

MEDIATION AND SETTLEMENT

[26] The City advised the Tribunal that it declines to enter mediation.

HEARING ISSUES, FORMAT AND MATERIALS

Issues List

[27] At this CMC, the Tribunal directed the Parties to develop a consolidated Issues List for the hearing and file that with the Tribunal. The Parties have not been able to agree on the Issues List. The Tribunal will revisit the question of the issues for the hearing at the next CMC. If the Parties continue to be unable to agree on a list of issues for the hearing, the Tribunal will take such actions and make such directions on the matter as it considers appropriate.

Statement of Agreed Facts and Evidence

[28] The Parties have filed an updated Statement of Agreed Facts and Evidence (“SAF”). The Tribunal will withhold any questions it may have on the updated SAF until the next CMC.

Examination of Witnesses

[29] The Parties have all asked that the Tribunal proceed by way of an oral hearing with submissions. The Parties are divided on the question of whether the Tribunal should examine any witnesses or simply rely on the affidavits that have been filed by various Parties. In brief summary, the Appellant Parties generally support the examination of witnesses by the Tribunal. The City and Morguard, specifically, oppose examination by the Tribunal of any witnesses.

[30] A decision on this point is complicated by other matters.

[31] Tribunal Rule 26.12(e) directs an Appellant Party to file an Appeal Record that includes:

e) an affidavit by a person, or persons, setting out the material facts associated with the application, and where the person can be qualified to offer opinion evidence on a matter, that person's opinion with respect to the matters in issue in relation to the appeal of the decision or non-decision, along with a signed copy of the acknowledgment form attached to the Rules, and the person's résumé supporting their qualification to present opinion evidence...

[32] Tribunal Rule 26.15 permits, in this case the City, to file a Responding Appeal Record where the City is of the opinion that the Appellant's appeal record is incomplete. Where a Responding Appeal Record is filed, Tribunal Rule 26.15(c) directs the City to file an affidavit. Tribunal Rule 26.15(c) is identical to Tribunal Rule 26.12(e), cited above.

[33] While the filing of an Appeal Record is mandatory for Appellant Parties, the filing of a Responding Record, by the City in this case, is discretionary.

[34] ACC filed an affidavit in accordance with Tribunal Rule 26.12(e) as part of its Appeal Record.

[35] The City filed an affidavit in accordance with Tribunal Rule 26.15(c) as part of its

Responding Appeal Record.

[36] ACC submits that, for its issues, the Tribunal should examine its affiant and the City's affiant. A number of secondary procedural questions arise if the Tribunal decides to examine witnesses. These questions have been put to the Divisional Court for its opinion in a stated case from the Tribunal, set out more fully below.

[37] The City submits that the information and evidence to assist the Tribunal in reaching a decision is found in the affidavits filed by the City and by ACC and that the Tribunal may rely on these without the need to examine the affiants.

[38] As is also discussed more fully below, the City has filed a motion for leave to appeal the decision of the Tribunal that set out the Tribunal's stated case to the Divisional Court. In the grounds set out in this motion for leave to appeal, the City specifically challenges the jurisdiction of the Tribunal to require an affidavit to be filed with an Appeal Record and challenges the jurisdiction of the Tribunal to permit an affidavit to be submitted as part of a Responding Appeal Record.

[39] The Tribunal understands that the City has not abandoned its motion for leave but has agreed to adjourn it *sine die*. The Tribunal also understands that the City has decided to reduce these challenges to jurisdiction to an additional question the City will ask the Divisional Court to consider when the Divisional Court considers the questions put to it by the Tribunal in the stated case.

[40] Under these circumstances, the Tribunal finds that it is premature, and would be inappropriate, to reach a decision on the question of whether the Tribunal should examine witnesses at an oral hearing or whether the Tribunal should instead rely upon the written affidavits that have been filed.

[41] The Tribunal will revisit this question at the next CMC.

Motion Seeking Right of Reply

[42] ACC has brought a motion asking the Tribunal to grant it a right of reply to the City's Responding Appeal materials. In light of the Tribunal's decision to defer the question of the procedures surrounding the possible examination of witnesses to the next CMC, ACC has agreed to defer its motion to that CMC as well.

Qualified Verbatim Reporter

[43] The Tribunal will consider whether a qualified verbatim reporter should be present at the oral hearing. A final decision by the Tribunal on the format of the hearing and whether a qualified verbatim reporter is appropriate may be informed by the Divisional Court's opinion on the questions raised in the Tribunal's stated case and its opinion on the question the City intends to ask be added to the Tribunal's stated case. It may also be informed by a decision by the Divisional Court on the City's motion for leave to appeal, should that motion for leave to appeal still remain. The Tribunal defers this question to the next CMC.

THE STATED CASE, THE CITY'S ADDITIONAL QUESTION AND NOTICE OF POSTPONEMENT

[44] On October 25, 2018, the Tribunal in *Canadian National Railway Company v. Toronto (City)*, 2018 CanLII 102206 (ON LPAT) (PL180210) ("*Rail Deck*") stated a case for the opinion of the Divisional Court upon a question of law under s. 36(1) of the *LPAT Act* dealing in part with matters that may arise with the examination of witnesses.

[45] The City has filed a motion for leave to appeal the Tribunal decision in *Rail Deck*.

[46] Section 33(2) of the *LPAT Act* gives the Tribunal the power to examine, as follows:

Power to examine

- (2) At any stage of a proceeding, the Tribunal may,
- (a) examine a party to the proceeding;
 - (b) examine a person other than a party who makes a submission to the Tribunal in respect of the proceeding;
 - (c) require a party to the proceeding or a person other than a party who makes a submission to the Tribunal in respect of the proceeding to produce evidence for examination by the Tribunal; and
 - (d) require a party to the proceeding to produce a witness for examination by the Tribunal.

[47] Section 42(3)(b) states that:

...no party or person may adduce evidence or call or examine witnesses...

[48] Section 3 of Ontario Regulation 102/18 (“O. Reg. 102/18”) goes further to prevent the examination of witnesses prior to a hearing:

Restriction on witness examinations before hearing

3. In addition to the restriction under clause 42 (3) (b) of the Act on the calling or examining of witnesses at an oral hearing of an appeal described in subsection 38 (1) or (2) of the Act, no party or person may call or examine witnesses prior to the hearing of such an appeal

[49] The Tribunal’s questions seeking the opinion of the Court are:

1. Since the terms “examine” and “cross-examine” have different meanings under the *Statutory Powers Procedure Act*, does the term “examine” as used in subsection 42(3)(b) of the *LPAT Act* and section 3 of O. Reg. 102/18 preclude the ability of a party to cross-examine a witness?
2. With respect to a hearing pursuant to subsections 38(1) and 38(2) of the *LPAT Act*, do the principles of natural justice and procedural fairness allow the parties an opportunity to ask questions of a witness called and examined by the Tribunal?
 - 2a. If the answer to Question 2 is “yes,” are their questions limited to matters arising from the questions asked by the Tribunal?
3. With respect to a hearing pursuant to subsections 38(1) and 38(2) of the *LPAT Act* and where the Tribunal directs production of affidavits pursuant to subsection 33(2)(c) therein, does the limitation in subsection 42(3)(b) of the *LPAT Act* and in section 3 of O. Reg. 102/18 prevent the cross-examination of an affiant before a hearing and the introduction of a cross-examination transcript in a hearing?

3a. If the answer to Question 3 is “no,” can the evidence obtained in cross- examination be referred to in submissions in a hearing?

[50] The Tribunal understands that the Divisional Court has set April 25, 2019 to hear the Tribunal’s stated case.

[51] The City has agreed to adjourn *sine die* its motion for leave to appeal. In the interim, the City seeks to add a fourth question at the April 25, 2019 Divisional Court appearance. This proposed fourth question, as set out in the disposition from the Divisional Court issued on December 11, 2018 from a teleconference conducted on November 29, 2018 in *Craft Acquisitions Corp v Toronto (City)* (29 November 2018), Toronto 723/18 (Ont Div Ct), is: does the LPAT have jurisdiction to require the parties to provide additional evidence to the Tribunal?

[52] The Tribunal has set a second CMC to commence at **10 a.m. on Tuesday, May 7, 2019, at:**

**Local Planning Appeal Tribunal
655 Bay Street, 16th floor
Toronto, Ontario**

[53] Pursuant to O. Reg. 102/18 s. 1(2)1(ii), it is the opinion of the Tribunal that it is necessary for the fair and just determination of the appeals to exclude from the time period applicable to these proceedings the period from this first CMC, being December 11, 2018, to the second scheduled CMC, being May 7, 2019. A Notice of Postponement will issue separately.

[54] The second CMC will deal with as many of the outstanding matters noted above as possible, depending in part on the status of the matters before the Divisional Court. The Tribunal will also consider whether a further Notice of Postponement is necessary.

ORDER

[55] The Tribunal orders that:

1. Nuyork Investments Limited, Jarel Investments Limited and Nuber & Dale Construction Limited (together “Nuberg”) are added as Parties to these proceedings
2. Morguard Investments Limited is added as a Party to these proceedings
3. Enbridge Gas Distribution Inc. is added as a Participant to these proceedings

“Susan de Avellar Schiller”

SUSAN de AVELLAR SCHILLER
VICE-CHAIR

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

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