

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



ISSUE DATE: November 30, 2020

CASE NO(S): PL200190

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

Appellant:	Calloway REIT (Whitby NE) Inc.
Subject:	By-law No. BL 7613-20
Municipality:	Town of Whitby
LPAT Case No.:	PL200190
LPAT File No.:	PL200190
LPAT Case Name:	Calloway REIT (Whitby NE) Inc. v. Whitby (Town)

Heard: November 9, 2020 by video conference call

APPEARANCES:

Parties

Counsel

Calloway REIT (Whitby NE Inc.) ("Calloway")	D. Bronskill
Town of Whitby (the "Town")	W. Mar
70 Taunton Storage GP Corporation ("TSC")	A. Platt A. Lusty

DECISION DELIVERED BY S. JACOBS AND ORDER OF THE TRIBUNAL

[1] TSC intends to develop its property located at 70 Taunton Road East in Whitby (the “TSC property”) with a commercial self-storage building. The Town adopted an

Official Plan Amendment and passed a Zoning By-law Amendment, By-law No. 7613-20 (the “ZBA”) to facilitate TSC’s planned development. TSC’s immediate neighbour to the west, Calloway, appealed only the ZBA to the Tribunal, pursuant to s. 34(19) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended (the “Act”).

[2] Calloway operates a commercial plaza at 20 Taunton Road East consisting of a range of restaurant, retail, and service retail uses (the “Calloway property”). Calloway also intends to develop a self-storage facility on the northeast corner of its property and has an active application before the Town. As part of the site plan approval process for Calloway’s plaza in 2012, the Town secured an easement over the Calloway property to provide ingress and egress to Taunton Road and Baldwin Street (the “easement”). The easement is at the core of Calloway’s appeal, as the easement was intended to facilitate mutual vehicular access between the Calloway and TSC properties. Calloway does not dispute TSC’s intended use of its property.

[3] The Tribunal convened this hearing event as a Case Management Conference (“CMC”) as required by the *Local Planning Appeal Tribunal Act, 2017*, S.O. 2017, c. 23, Sched. 1. Prior to the CMC, and in accordance with the Tribunal’s *Rules of Practice and Procedure*, TSC filed a motion, returnable at the CMC, requesting that the Tribunal grant TSC party status in the appeal, and that the Tribunal dismiss Calloway’s appeal in its entirety. Given that TSC is the applicant in this matter, the Tribunal granted TSC’s request for party status at the start of the CMC and proceeded to hear the motion. Following the motion, the Tribunal attended to the matters typically addressed during a CMC and heard the party’s submissions regarding the length of hearing, Procedural Order and Issues List, all of which would be of assistance to the Tribunal should the motion be denied and the matter scheduled for a hearing.

[4] For the motion, the Tribunal had before it TSC’s Notice of Motion, Calloway’s Response to Motion, and TSC’s Reply. The Tribunal heard oral submissions from counsel and received extensive authorities from counsel reflecting the OMB and Tribunal’s practice on motions to dismiss. The Tribunal also had affidavit evidence of

two land use planners: David McKay, on behalf of TSC, and Mike Dror, on behalf of Calloway. In response to the issues raised by Mr. Dror, TSC filed a supplementary affidavit from Mr. McKay and filed an affidavit from its retained transportation engineer, Mark Crockford.

[5] For the reasons that follow, the Tribunal finds that Calloway's appeal discloses no apparent land use planning ground upon which its appeal could succeed, in whole or in part, and accordingly grants TSC's motion.

POSITIONS OF THE PARTIES

[6] Calloway takes no issue with TSC's intended use of its property; notably, Calloway did not appeal the Town's adoption of an Official Plan Amendment for the TSC property. Rather, Calloway's appeal raises concerns of prematurity regarding TSC's proposed development, as it does not appear to support the future extension of the easement, and it is unclear as to whether the Town plans to enforce the continuation of the easement on the Calloway property. Calloway insists that the two properties require a comprehensive planning exercise in which the Town will confirm whether it wishes to maintain the Calloway easement and extend it across the TSC property.

[7] TSC, in its motion, submits that Calloway's appeal does not raise any authentic, genuine, or legitimate land use planning grounds, and must therefore be dismissed in accordance with s. 34(25) of the Act. In TSC's submission, the matter of the easement is more appropriately dealt with at the site plan phase, just as it was for Calloway's development. TSC is willing to convey an easement to the Town if requested, and its site plan, which has been submitted to the Town and is not before this Tribunal, accounts for this contingency. Additionally, TSC alleges that Calloway's appeal is frivolous, vexatious, and made only for the purpose of delay. TSC also notes that Calloway's own self-storage facility proposal will effectively plug the easement, hence Calloway's interest in prompting a decision about the future of the easement.

[8] The Town did not file a response to the motion and confirmed during the CMC that it takes no position. Mr. Mar expressed only the Town's desire to have the appeal dealt with efficiently.

ISSUES AND ANALYSIS

[9] The Tribunal's authority to dismiss an appeal without a motion is derived from s. 34(25) of the Act. The Tribunal need only find one of the listed circumstances in order to dismiss the appeal:

Dismissal without hearing

(25) Despite the *Statutory Powers Procedure Act* and subsection (24), the Tribunal may, on its own initiative or on the motion of any party, dismiss all or part of an appeal without holding a hearing if any of the following apply:

1. The Tribunal is of the opinion that,
 - i. the reasons set out in the notice of appeal do not disclose any apparent land use planning ground upon which the Tribunal could allow all or part of the appeal,
 - ii. the appeal is not made in good faith or is frivolous or vexatious,
 - iii. the appeal is made only for the purpose of delay, or
 - iv. the appellant has persistently and without reasonable grounds commenced before the Tribunal proceedings that constitute an abuse of process.

[10] TSC asserts that Calloway's appeal meets the requirements in s. 34(25)1.i., ii., and iii. The Tribunal will first consider the issue of apparent land use planning grounds (s. 34(25)1. i.), and will then address ss. 34(25)1.ii and iii together.

1. Land Use Planning Grounds

[11] For the Tribunal to determine whether the appeal could be allowed, as required by s. 34(25)1.i., the Tribunal must first consider the policy and statutory context in which the decision on the merits would be made were the matter to proceed to a hearing.

When considering whether to approve a zoning by-law amendment, the Tribunal must determine whether it is consistent with the *Provincial Policy Statement, 2020* (the “PPS”) and conforms with the Growth Plan for the Greater Golden Horseshoe, 2019 and any applicable official plan. By virtue of s. 2.1 of the *Planning Act*, the Tribunal must also have regard to the decision of Town Council, including the information and material that was before it when it made its decision. The Tribunal, in carrying out its public interest mandate under the Act, also considers whether a zoning by-law amendment represents good land use planning.

[12] It is a well-established principle that the Tribunal may look beyond the written appeal letter to determine whether there are genuine and authentic land use planning issues worthy of adjudication. The test regarding a motion to dismiss under s. 34 of the Act was first articulated by the Tribunal’s predecessor, the OMB, in *City of Toronto v. East Beach Community Association*:

... it is our view that these provisions allow the Board to examine whether there has been disclosure of planning grounds that warrant a hearing. ... The Board is entitled to examine the reasons stated to see whether they constitute genuine, legitimate and authentic planning reasons. This is not to say that the Board should take away the rights of appeal whimsically, readily and without serious consideration of the circumstances of each case. This does not allow the Board to make a hasty conclusion as to the merit of an issue. Nor does it mean that every appellant should draft the appeal with punctilious care and arm itself with ironclad reason for fear of being struck down. What these particular provisions allow the Board to do is seek out whether there is authenticity in the reasons stated, whether there are issues that should affect a decision in a hearing and whether the issues are worthy of the adjudicative process.¹

[13] The Tribunal does not take lightly a decision to dismiss an appeal, and therefore must carefully consider the evidence and submissions on the motion before it to determine whether the appeal discloses genuine, legitimate, and authentic planning reasons.

[14] It is not necessary for an appellant responding to a motion to dismiss to convince the Tribunal that its appeal will succeed. Rather, the onus is on the moving party to demonstrate that an appeal does not contain a legitimate land use planning ground that

¹ 1996 CarswellOnt 5740, 42 O.M.B.R. 505 at para. 9 (*East Beach*).

could succeed if the matter proceeded to a hearing.²

[15] Numerous OMB and Tribunal decisions on motions to dismiss have considered the evidentiary requirements for an appeal to survive such a motion. While expert evidence—planning or otherwise—is not required for an appeal to proceed to a hearing,³ the Tribunal will carefully consider such evidence when it is tendered during the motion. Where an appellant disagrees with data or expert analysis that support a proposed development, the Tribunal expects the appellant to present its own analysis in support of its appeal.⁴ The Tribunal therefore expects that when an appellant tenders evidence in response to a motion to dismiss its appeal, the evidence will support the case the appellant intends to make to the Tribunal at the hearing. Similarly, and in accordance with the long line of OMB and Tribunal cases on these motions, that evidence must rise above the level of mere speculation and apprehension if the appeal is to survive the motion.

[16] Calloway's responding motion record puts forward four issues that it submits should be adjudicated by the Tribunal, related to its position that the TSC development is premature without first resolving the easement issue:

- a) Is it premature to approve the TSC Application without resolving the Town's requirement for an integrated vehicular easement/driveway through the Appellant property and the TSC property?
- b) Is it premature to approve the TSC Application until an efficient and coordinated approach to redevelopment of the TSC property and the Appellant property is secured?

² *Flamborough Chamber of Commerce v. Hamilton (City)*, 2005 CarswellOnt 5247 at para. 10 (*Flamborough*).

³ See, e.g., *Bothwell v. Grimsby (Town)*, 2017 CarswellOnt 15136, 3 O.M.B.R. (2d) 236.

⁴ *Flamborough* at para. 12; *Zellers Inc. v. Cobourg (Town)*, 2001 CarswellOnt 7497 at paras. 41-42.

c) Should a holding provision be imposed to secure the requirement to extend the vehicular easement/driveway through the TSC property?

d) Should By-law No. 7613-20 be revised to secure an increased minimum setback from the western property line?

[17] Calloway submits that the ZBA is premature until the easement issue is resolved. It believes that the development of the TSC property should be part of a comprehensive planning exercise for the Calloway and TSC properties that determines the future of the easement. Its concerns, as articulated by Mr. Dror, can be divided into two categories: comprehensive planning and traffic functionality.

[18] Mr. Dror, in his affidavit refers to three Town Official Plan ("OP") and Secondary Plan policies that promote comprehensive planning with respect to site circulation, connectivity, and shared access. While he provides a succinct description of these policies, nowhere does he indicate that the ZBA does not conform with these policies, nor even suggest that they may not conform. He simply highlights them in support of his opinion that the appeal discloses land use planning grounds, as follows at paras. 34-35 of his affidavit:

In this regard, there are a number of relevant policies in the Official Plan and Secondary Plan that promote comprehensive planning related to matters such as integrated site circulation and connectivity, shared access minimizing the number of access points. For example, Policy 6.2.3.13.5 of the Official Plan provides that the Town shall minimize the number of access points from a road by requiring common access points shared by contiguous developments, particularly in industrial and commercial areas. In addition, Policy 11.8.4.7 of the Secondary Plan provides that development shall accommodate a continuous transit route through the Major Commercial designation from Brock Street to Taunton Road, while Policy 11.8.14.5 provides that primary access shall be coordinated between adjacent landowners to minimize pedestrian and vehicular conflicts.

In my opinion, the consideration of the extension of the Easement onto the TSC Property is a land use planning matter that should be comprehensively, between the two properties.

[19] Mr. McKay agrees that the cited OP policies are relevant, however, in his opinion, the Town has undertaken a comprehensive planning exercise and has

indicated its intention to deal with the potential for extending the easement through the site plan process. This is consistent with the Town's approach to secure the easement over the Calloway property. Mr. Dror opines that the extension of the easement over the TSC property could be secured through the ZBA, if the Town deemed it necessary. However, he does not indicate why this should be the case, nor why securing an easement over the TSC property through site plan approval, as was done for Calloway, is problematic from a land use planning perspective. The Tribunal therefore sees no legitimate, genuine, or authentic issue regarding comprehensive planning that is worthy of adjudication.

[20] With respect to traffic functionality, Mr. Dror raises a concern that the ZBA, in allowing a 0 metre ("m") setback from Calloway's property, could allow TSC to place its building abutting Calloway's property and plugging the easement at the lot line. He acknowledges that TSC's site plan was modified to flip the building so that this is not the case, however, he questions whether any analysis was conducted regarding functionality of the easement if extended. He states that it is unclear whether a turning radius analysis was conducted regarding vehicular traffic, including commercial traffic. He also notes that the site plan identifies the Calloway easement in the incorrect location, with its southern boundary approximately 102 m north of Taunton Road when in reality it is located approximately 65.6 m north of Taunton Road. On this basis, he questions whether the functionality analysis was done correctly.

[21] Mr. Crockford, a traffic engineer, provides a response to these concerns in his affidavit, filed as part of TSC's reply. In his opinion, the planned 6 m drive aisle (as reflected in the ZBA) is wide enough to accommodate the expected vehicular traffic, including turns to and from the Calloway easement. He notes that if the Town chooses to require the easement to be extended, there are a variety of locations to connect the drive aisle to the easement. Mr. Crockford also addresses the difference in location of the easement noted by Mr. Dror and confirms that this has no material impact on the transportation analysis regarding the TSC proposal.

[22] Mr. Dror's concern about the ZBA's 0 m setback is the only tangible concern raised about the instrument Calloway has appealed to the Tribunal. However, the Tribunal finds that the questions Mr. Dror has raised do not rise above mere speculation. If Calloway were truly concerned about transportation and functionality being impacted by the ZBA, it could have tendered affidavit evidence from a traffic engineer. It did not, and Mr. Crockford's affidavit demonstrates that there are no concerns that are worthy of the Tribunal's adjudication. Additionally, Mr. Bronskill submitted that Calloway's concern is not one of functionality; rather, it is a question of prematurity.

[23] The Tribunal appreciates Calloway's concerns about prematurity. However, arguments regarding prematurity are generally linked to a land use planning consequence. There is no such consequence articulated in Calloway's appeal, nor in its response or submissions on this motion. On the contrary, Calloway is not taking a position as to whether the easement should be extended. What Calloway desires is certainty about the Town's position regarding the easement. That is, Calloway would like the Town to decide whether it wishes to retain the easement over the Calloway property, as this relates to Calloway's current development proposal. This appeal is not the appropriate mechanism for Calloway to obtain a decision from the Town regarding the easement. The Tribunal has no ability, in considering the ZBA, to force the Town to decide whether to retain the Calloway easement and extend it over the TSC property.

[24] Given that Calloway's newest development application is before the Town, and as Mr. Mar advised, should have a decision next spring, Calloway may soon know the Town's position regarding the easement. Similarly, the Town has TSC's site plan application before it, and has indicated that it will consider access issues through that process.

[25] Based on a careful review of the motion materials, including the affidavit evidence tendered by both parties, and on the submissions of counsel during the motion, the Tribunal finds that Calloway's appeal does not disclose any apparent land

use planning ground upon which the Tribunal could allow all or part of the appeal.

2. Frivolous, Vexatious, and Delay

[26] The Tribunal's finding regarding s. 34(25)1.i. is sufficient to dismiss the appeal, and it is not necessary to consider whether the appeal is not made in good faith, or is frivolous or vexatious (s. 34(25)1.ii.), nor whether the appeal was made only for the purpose of delay (s. 34(25)1.iii). The Tribunal heard submissions from Mr. Platt in support of TSC's position that Calloway is either using its appeal for commercial advantage (that is, to delay TSC's project) or to obtain leverage over the Town so that it will release the easement, or perhaps both.

[27] While TSC provided several authorities in support of this argument, the Tribunal wishes only to note an important distinction between this case and the many competition cases where the Tribunal has rejected competition apprehensions were cloaked in planning concerns. Those cases often involve an appellant who has raised concerns about market impact or impact on a commercial area or central business district.⁵ Calloway has raised no such concerns here and has, from the time of filing its appeal, made clear it takes no issue with the intended use of TSC's property for a self-storage facility.

CONCLUSION

[28] The Tribunal finds, based on a thorough review of all filed motion materials and on the submissions made during the hearing, that Calloway's appeal raises no apparent land use planning ground upon which the Tribunal could allow all or part of the appeal of the ZBA. Calloway's appeal merely raises questions and apprehensions about the future of the easement, and not with the ZBA it has appealed to the Tribunal. Accordingly, the Tribunal will dismiss Calloway's appeal and close its file in this matter.

⁵ See e.g., *Flamborough; Zellers; Parry Sound Mall Inc. v. Ontario (Municipal Affairs)*, 2018 CarswellOnt 6962.

ORDER

[29] The Tribunal orders that the motion is granted and the appeal by Calloway REIT (Whitby NE Inc.) is dismissed.

“S. Jacobs”

S. JACOBS
MEMBER

If there is an attachment referred to in this document,
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Local Planning Appeal Tribunal

A constituent tribunal of Ontario Land Tribunals

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