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

ISSUE DATE: October 25, 2018 **CASE NO(S).:** PL180210

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:	CRAFT Acquisitions Corp. and P.I.T.S. Development Inc.
Appellant:	Canadian National Railway Company and Toronto Terminals Railway Company Ltd.
Subject:	Proposed Official Plan Amendment No. OPA 395
Municipality:	City of Toronto
LPAT Case No.:	PL180210
LPAT File No.:	PL180210
LPAT Case Name:	Canadian National Railway Company v. Toronto (City)

Heard:	Case Management Conference	September 20-21, 2018, in Toronto, Ontario

APPEARANCES:

Parties	**Counsel**
City of Toronto	B. O'Callaghan, K. Matsumoto, A. Moscovich, and N. Muscat
CRAFT Acquisitions Corporation and P.I.T.S. Development Inc.	I.T. Kagan and K. Jennings

Canadian National Railway Company and Toronto Terminals Railway Company Ltd.	A.M. Heisey and M. Krygier-Baum

DECISION BY JAMES McKENZIE, SUSAN de AVELLAR SCHILLER, AND SARAH JACOBS AND ORDER OF THE TRIBUNAL

INTRODUCTION and CONTEXT

[1] On December 5, 2017, the City of Toronto Council ("City") adopted Official Plan Amendment No. 395 ("OPA 395" or "Amendment") to create Rail Deck Park, a significant new park and multi-functional open space in Downtown Toronto. Responding to the anticipated effect of substantial population growth and low levels of parkland in the downtown area (as compared to the rest of the city), the Amendment establishes a new secondary plan for the area situated between Bathurst Street (west) and Blue Jay Way (east), on the south side of Front Street. The park's name derives from the fact that it will be located on an engineered platform covering a stretch of the Union Station rail corridor traversing the downtown area. Identified as a "once-in-a-generation opportunity," preliminary budgeting estimates a total cost of $1.665 billion to construct Rail Deck Park.

[2] Two appeals have been filed against OPA 395 pursuant to subsection 17(24) of the *Planning Act*. The first appeal is collectively filed by CRAFT Acquisitions Corporation ("CRAFT") and P.I.T.S. Developments Inc. ("P.I.T.S."). The second is collectively filed by Canadian National Railway Company ("CN") and Toronto Terminals Railway Company Ltd. ("TTR"). These four interests are the Appellants. The Appellants have property interests within the area affected by the Amendment: CN and TTR own developable air rights above 27 feet above the top-of-rail elevation within the Union Station rail corridor; and CRAFT and P.I.T.S., pursuant to an agreement of purchase and sale with CN and TTR, are under contract to purchase those air rights to develop above the rail tracks. The Appellants have concurrently appealed private applications under other sections of the *Planning Act* to advance their development aspirations.

[3] Given recent changes to planning legislation (discussed below), their private application appeals and the appeals of the Amendment are considered mutually exclusive despite the fact they relate to roughly the same area.

[4] On April 3, 2018, Bill 139 was proclaimed. Among other things, it enacted the *Local Planning Appeal Tribunal Act, 2017* ("*LPAT Act*"). The *LPAT Act* fundamentally changes the manner in which specific categories of planning appeals under the *Planning Act* are to be dealt with in a hearing. Those categories, defined in subsections 38(1) and 38(2) of the *LPAT Act*, include any appeal relating to (1) a municipal decision approving or refusing to approve an official plan or zoning by-law, (2) a municipal decision approving or refusing an amendment to an existing official plan or zoning by-law, (3) the lack of a municipal decision approving or refusing an amendment to an existing official plan or zoning by-law, and (4) the lack of a municipal decision granting or refusing the approval of a plan of subdivision. The appeals of OPA 395 fall in the second category above. Other changes include (1) continuing the Ontario Municipal Board as the Local Planning Appeal Tribunal ("Tribunal"), (2) repealing the *Ontario Municipal Board Act* and replacing it with the *LPAT Act*, (3) amending the *Planning Act* to prescribe specific tests for the disposition of appeals in the above-noted categories, and (4) removing participatory rights and restricting other rights of parties and participants in hearings dealing with those specific categories of planning appeals. For all other matters under the *Planning Act* and the numerous statutes and regulations from which the Tribunal derives jurisdiction, the hearing process remains a traditional one, with full participatory rights.

[5] The *LPAT Act* also directs the Tribunal to convene a Case Management Conference ("CMC") for the above-noted categories of planning appeals and itemizes matters to be addressed therein. The requirement to convene a CMC codifies a long-standing and continuing practice of using the prehearing conference process tool to case manage and organise complex appeals. The appeals filed against OPA 395 are the first to proceed to a CMC under the new regime introduced by Bill 139.

[6] This decision implements the results of the Tribunal's consideration of the itemized matters relevant to the appeals at this time as well as other matters arising in connection with the appeals. With respect to itemized matters not specifically addressed in this decision, counsel have been directed to confer and to advise the Tribunal whether any further action is necessary.

PARTIES and PARTICIPANTS

[7] The statutory parties in this matter are:

- City of Toronto
- CRAFT Acquisitions Corporation
- P.I.T.S Developments Inc.
- Canadian National Railway Company
- Toronto Terminals Railway Company Ltd.

[8] Pursuant to subsections 40(1) and 40(4) of the *LPAT Act*, the participants are:

- Metrolinx – the provincial government agency responsible for public transit and transportation infrastructure in the Greater Toronto and Hamilton Area, and the owner of the ground and air space up to 27 feet above the top-of-rail elevation.

- Grange Community Association Inc. ("Grange") – a community organisation representing local and city-wide interests of residents in the Grange neighbourhood bounded by College Street (north), Queen Street (south, University Avenue (east), and Spadina Avenue (west).

[9] Subsection 42(1) of the *LPAT Act* stipulates that parties are the only persons who can participate in an oral hearing of an appeal described in subsection 38(1), (which includes an appeal made under subsection 17(24) of the *Planning Act*).

Participants cannot take part in an oral hearing. This is a significant departure from the opportunity a participant enjoyed before the proclamation of Bill 139 and continues to enjoy in the hearing of an appeal falling outside of the categories described in subsection 38(1). Despite their status in this case, Metrolinx and Grange acknowledge the restriction on their participation in the hearing. They have each, moreover, provided an undertaking to be available at the hearing to answer questions or otherwise be of assistance to the Tribunal.

HEARING and ORDER OF PROCEEDINGS

[10] The *LPAT Act* has profoundly changed the complexion of a hearing before the Tribunal to determine the merits of any appeal in the categories described in subsections 38(1) and 38(2) — especially regarding the means by which evidence may be obtained from and/or through a witness (addressed below). Given the significance of what Rail Deck Park represents and the magnitude of what is at stake in the consideration of the appeals, it is essential that the Tribunal have the benefit of *viva voce* land use planning evidence. An oral hearing will facilitate that opportunity.

[11] A hearing is scheduled for five consecutive days, beginning at **10:00 a.m.** on **Monday, May 27, 2019,** at:

Local Planning Appeal Tribunal,
655 Bay Street, 16th Floor,
Hearing Room 16-1,
Toronto ON M5G 3E1

[12] A procedural order is not required in this matter.

ISSUES FOR THE HEARING

[13] The Issues List for the hearing is appended to this decision as Attachment No. 1.

[14] The Tribunal's *Rules of Practice and Procedure* require statutory parties to each file an appeal record and case synopsis addressing issues for a hearing. In this case, during the CMC, counsel were directed to confer for the purpose of producing an issues list reflecting meaningful substance based on their respective materials. The result is the appended list.

VIVA VOCE **EVIDENCE and WITNESSES**

[15] Again, given the magnitude of what Rail Deck Park represents, the Tribunal will exercise its power to examine each party's respective land use planner(s) in the hearing, pursuant to subsection 33(2) of the *LPAT Act*. According to subparagraph (d) thereunder, the Appellants are directed to produce Mr. Ian Graham; and the City is directed to produce Mr. Joe Berridge, Ms. Lynda MacDonald, Ms. Heather Oliver, and Mr. Paul Mulé. This direction includes a requirement to have the planners present on the first day of the scheduled hearing. Each witness is to bring with them and to have in their possession all documents material to the issues for the hearing and on which they relied to formulate their professional planning opinion(s) on the issues. If they have not already done so, each planner is also required to execute an Acknowledgment of Expert's Duty form and provide that to the Tribunal at the outset of their testimony.

[16] In connection with the Tribunal's decision to call and examine the professional planners, counsel advised, on consent, that a court reporter will be retained and present for the oral evidence portion of the hearing. In the event the parties have a change of heart prior to the scheduled hearing, the Tribunal orders that a qualified verbatim reporter attend for the purpose of recording the testimony of each planning witness, in accordance with Rule 26.25 of its *Rules of Practice and Procedure*. The cost of the reporter and the production of transcripts to be provided to the Tribunal shall be borne by the parties.

[17] In terms of the order in which the hearing will proceed — with respect to the sequence that witnesses will be examined by the Tribunal and that submissions will be received by the Tribunal pursuant to subsection 42(3) of the *LPAT Act* and section 2(1) of O.Reg. 102/18 — the Tribunal will first complete all witness examinations and will then receive counsel submissions. Subject to further refinement (including the potential for modification) by the Tribunal to facilitate the efficient and efficacious examination of witnesses, the sequence will be as follows: the Appellants' witness will be examined first, followed by the City's witnesses; then, the Appellants' submissions will be received, followed by the City's submissions.

[18] Counsel for the Appellants have requested a limited right of reply for submissions following the City's submissions. Subsection 2(1)(a) of O.Reg. 102/18 includes no distinction with respect to how prescribed time available to a party for its submissions is to be allocated. In this case, consistent with the convention of an initiating party having a right of reply, the Appellants may, if they wish, reserve some amount of that prescribed time for reply submissions.

MEDIATION

[19] In recognition of the success of the mediation program instituted by the Tribunal's predecessor, the Ontario Municipal Board, and the longstanding and ongoing practice of canvassing opportunities for mediation in prehearing conferences, the Tribunal is now required by subsection 39(2) of the *LPAT Act* in a CMC to discuss opportunities for settlement, including the possible use of mediation. The success of any mediation initiative depends on many things. Consistent with the widely-accepted principle that participation in mediation is a voluntary activity, first among those things is ensuring that each party provides its representatives with a clear mandate and parameters for negotiation in the event mediation is to be pursued.

[20] In the present case, all counsel have indicated a readiness to consider mediation, subject to a number of contextual factors. First, given the fall scheduled municipal election, Mr. O'Callaghan explained that, while he is prepared to recommend mediation to his client, he cannot be in a position to receive a mandate and instructions from Council before its initial meetings following the election, likely sometime in late January or February, 2019. Second, Messrs. Kagan and Heisey reported that, while their respective clients are generally supportive of mediation, they too cannot be in a position to secure a mandate and instructions without first knowing the parameters for mediation set out by Council. The Tribunal understands and, taking into account the scheduled hearing dates set out above, directs the following related schedule for the ongoing consideration of mediation:

- Council is to consider the possibility for mediation and provide direction to Mr. O'Callaghan by a date such that he will report to the Tribunal and the other parties, no later than March 1, 2019, whether the City is willing to enter mediation and, if so, an indication of the general parameters within which the City is prepared to mediate; and then,

- in the event the City is prepared to mediate, the Appellants will have one week to consider mediation and the parameters for doing so indicated by the City, and will report to the City and the Tribunal, no later than March 8, 2019, whether the terms are such that they too are prepared to mediate; and then

- in the event all parties indicate willingness to mediate, the Tribunal will convene a meeting between March 8 and 22, 2019, with the parties to address a schedule and logistics for mediation, including any reconsideration of the May 2019 hearing dates; or,

- in the event any of the parties determine that mediation is not viable and the May 2019 hearing dates are confirmed, all materials for the hearing are to be submitted to the Tribunal no later than April 23, 2019.

[21] Shortly following the issuance of this decision, the Tribunal will issue a separate Order and Notice of Postponement to suspend the applicable timeline set out in subsection 1(1) of O.Reg. 102/18 for disposing of the appeals. That Order will invoke the reason set out in subsection 1(2)1.i. to suspend the timeline, effective the date of this decision.

STATING A CASE TO THE DIVISIONAL COURT

[22] Following the Tribunal's decision to call and examine the professional planners engaged in this matter, counsel jointly submitted an oral application to have the Tribunal exercise its powers under subsection 36(1) of the *LPAT Act* to "state a case in writing for the opinion of the Divisional Court upon a question of law." That application was accompanied by a long list of suggested questions for the Court's consideration and opinion. The basis for the joint application follows.

[23] The *LPAT Act*, in subsection 42(3)(b), stipulates that "no party or person may adduce evidence or call or examine witnesses" at an oral hearing relating to the categories of planning appeal described in subsections 38(1) and 38(2). As noted, this includes the appeals of OPA 395 made under subsection 17(24) of the *Planning Act*. Calling or examining witnesses at a hearing, moreover, is further controlled by regulation. O.Reg. 102/18, in section 3, provides that "no party or person may call or examine witnesses prior to the hearing of such an appeal."

[24] The elimination of a party's right to adduce evidence or to call or examine witnesses has led to considerable uncertainty in the wake of the Tribunal's decision to itself call and examine planning witnesses in this case. Counsel emphatically

expressed a genuine confusion about each party's ability to access natural justice and procedural fairness rights.

[25] Every appealed planning matter is important to each of the parties involved. When the sheer magnitude of what is at stake in the appeals of OPA 395 is considered through the combined lens of this axiom and the removal of a party's right to adduce evidence or to call or examine witnesses, the profundity of the confusion and the weight of its related burden are palpable and understandable. Engaging the ability to test the logic or challenge the veracity of a professional opinion believed prejudicial to one's interests has long been the *sine qua non* of pursuing one's planning goals in a hearing the Tribunal is obligated to hold under the *Planning Act*. The Tribunal can certainly appreciate, then, why the parties seek the Court's opinion on the subject of examining witnesses.

[26] In making their application, the parties submitted a number of questions for the Tribunal's consideration. Given their collective angst about proceeding without the ability to directly engage witnesses, the panel has undertaken a careful deliberation to distill their initial suggestions, lay bare the essence of their apprehensions, and capture in the following questions what it finds are the key challenges regarding the limitations set out in the *LPAT Act* and O.Reg. 102/18. The questions for an opinion from the Divisional 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?

2.a. 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?

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

[27] The Tribunal grants the parties’ joint application to state a case.

[28] The Tribunal’s reasons for stating a case follow.

[29] First, the questions are squarely and purely questions of law, thereby satisfying the statutory prerequisite set out in subsection 36(1). They engage the very essence of statutory interpretation relating to a party’s ability to access its natural justice and procedural fairness rights in a hearing, and likely would, if answered by the Tribunal, attract a correctness standard of review were answers ever challenged. They reveal, moreover, a genuine confusion about whether there is a conflict between the *LPAT Act* and the *Statutory Powers Procedure Act*.

[30] Second, it is plausible that the Tribunal will avail itself of the right to call and examine witnesses in complex cases where experts have been engaged. In cases, for example, where experts are on near equal footing with respect to their experience, reputation, qualifications, and the quality of the documentation of their analysis and conclusions, how is the Tribunal to draw meaningful distinctions between opinions as a basis for its analysis of such evidence? It is only by the Tribunal itself calling and

examining witnesses that the underpinnings for an expert opinion can be truly accessed and scrutinised as a component of establishing a preference of evidence (upon which a decision might then be based). The issues, ambiguity, and confusion underlying the questions transcend the Rail Deck Park appeals and will arguably manifest in every case where the Tribunal elects to call and examine witnesses. Guidance, therefore, is needed to safeguard transparency, consistency, and predictability.

[31] Third, the parties are *ad idem* and consent to having the questions stated to the Divisional Court. While that on its own is not a sufficient basis for stating a case, it nonetheless has significant bearing on the Tribunal's decision for the simple reason that there is no daylight between the parties regarding how they believe the questions ought to be answered. This is a situation unique from the facts in jurisprudence established by the Tribunal's predecessor, the Ontario Municipal Board, on stating a case to the Divisional Court. In those cases, the parties shared the interest of having a case stated, but differed on how they each wanted the question(s) answered. In this case, the parties' consent is based on both process (having the Court's opinion) and subject (access to question a witness), grounded in the shared belief that having the Court's guidance provides the best opportunity for the fair, just, and expeditious resolution of the merits of the appeals.

[32] Finally, the core of these questions involves the participatory rights of persons in hearings conducted by the Tribunal under its new governing legislation, and the nature of these novel questions falls outside of the Tribunal's many home statutes. The questions also transcend the substantive matter the Tribunal is charged with addressing in the course of adjudicating appeals and the specialised knowledge it applies when doing so. In this case, the Tribunal is required to determine whether OPA 395 is consistent with the Provincial Policy Statement and whether it conforms to the Growth Plan for the Greater Golden Horseshoe. If the Amendment is and does, it comes into full force and effect; if it is not or does not, it will be returned to Council for further consideration. The Court's guidance will establish whether — and, if so, inform how —

the Tribunal may, through questioning by others, access evidence from a witness as additional input to its deliberations and ultimate determination.

[33] Stating a case on the first appeals coming to a CMC is consistent with the modern view of administrative tribunals. Tribunals are showing themselves capable of taking on novel questions of administrative law, and this maturation will continue. Action premised on the modern view, however, must be balanced with modesty. After all, the modern view should not be construed as so modern that it represses a genuinely felt need for guidance, as is the case here.

[34] Nor is stating a case an indication that this Tribunal is acting prematurely or relying too quickly on the discretion to do so. Through its deliberations on the joint application, the panel engaged in a critical interrogation of the first questions submitted by the parties to ensure that the questions the Tribunal is submitting to the Divisional Court are not merely interesting questions of law. They are challenging questions of law that engage fundamental legal considerations which cut to the very core of a party's ability to marshal a case in appeals made in those categories described in subsections 38(1) and 38(2) of the *LPAT Act*. There will always be a view that tribunals must take on difficult legal questions, and appropriate cases for doing so will appear from time to time. This case, however, is not one of them because it represents the first time that restrictive procedures codified in new legislation are being operationalised. Naturally, seeking guidance makes sense.

[35] Shortly following the issuance of this decision, the Tribunal will issue a further and separate Order and Notice of Postponement to suspend the applicable timeline set out in subsection 1(1) of O.Reg. 102/18 for disposing of the appeals. This Order will be distinct from the Order suspending the timeline for the purpose of mediation, and will invoke the reason set out in subsection 1(2)1.ii. to suspend the timeline, effective the date of this decision. A separate order is deemed necessary to accommodate for the likely scenario that the stated case may proceed at a different pace than that for the consideration of mediation.

[36] Upon receipt of the Court's opinion, the Tribunal will convene a teleconference call with the parties to assess whether the assigned hearing duration remains appropriate.

ORDER

[37] The directions set out in this decision are so ordered.

[38] This panel is seized, subject to the Tribunal's ability to effectively manage its hearings calendar with available resources. The Tribunal may be spoken to regarding the ongoing case management of this matter.

"James McKenzie"

JAMES McKENZIE
ASSOCIATE CHAIR

"Susan de Avellar Schiller"

SUSAN de AVELLAR SCHILLER
VICE-CHAIR

"Sarah Jacobs"

SARAH JACOBS
MEMBER

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