

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



**ISSUE DATE:** April 18, 2018

**CASE NO(S):** PL170923

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:**  
**Subject:**

Muir Park Development Inc.  
Application to amend Zoning By-law No. 569-2013  
and 438-86 - Refusal or neglect of the City of  
Toronto to make a decision

**Existing Zoning:**  
**Proposed Zoning:**  
**Purpose:**  
**Property Address/Description:**  
**Municipality:**  
**Municipality File No.:**  
**OMB Case No.:**  
**OMB File No.:**  
**OMB Case Name:**

CR (569-2013) and MCR (438-86)  
Site Specific (To be determined)  
To permit seven-storey mixed use development  
2851 Yonge Street  
City of Toronto  
15 138688  
PL170923  
PL170923  
Muir Park Development Inc. v. Toronto (City)

**Heard:** March 13 and 14, 2018 in Toronto, Ontario

**APPEARANCES:**

**Parties**

Muir Park Development Inc.

City of Toronto

Desmond Layland

**Counsel**

David Bronskill

Alexander Suriano

William Roberts

## **INTERIM DECISION DELIVERED BY PAULA BOUTIS AND ORDER OF THE TRIBUNAL**

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### **INTRODUCTION**

[1] This appeal<sup>1</sup> relates to a seven-storey mid-rise mixed-use proposal at 2851 Yonge Street ("Subject Site"), situated in the former municipality of North York. It is south of Lawrence Avenue East, on the east side of Yonge. It is situated near a major transit subway station and has an open space with access to a significant ravine system nearby.

[2] Though the proposal was considered by the North York Community Council ("NYCC") and ultimately full Council, it is subject to the Old City of Toronto Zoning By-law No. 438-86 ("Old ZBL") as well as the new City Wide Zoning By-law No. 569-2013 ("New ZBL"). Access to the proposed development will be from Yonge Street and a commercial unit will front Yonge Street. Floors two through seven will accommodate 41 rental residential units, with 27% of the units being three-bedroom units.

[3] The Subject Site is currently a parking lot fronting an Avenue, as designated under the City's Official Plan ("OP"). On either side to the north and south are apartment buildings. To the east, or rear, is a 3.0 metre ("m") private lane. Detached dwellings, in particular two, are on the east side of the laneway that abuts the Subject Site. Those two homes have frontage on a private portion of Glengrove Avenue East, which is otherwise a public road.

[4] The proposal was the subject of a positive staff report at the City of Toronto ("City"). However, both at the NYCC and then at full Council (collectively, "Council"), a resolution was passed which did not adopt the proposed zoning by-law amendments to enable the proposal. The resolution requires staff to amend the proposal in the following two ways:

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<sup>1</sup> The appeal was heard by the Ontario Municipal Board, but is issued under the auspices of the Local Planning Appeal Tribunal.

- a. The first change relates to where the east set-back of 7.5 m, at the rear of the building, would be measured from. Staff measured it from the east side of a lane at the back of the property; that is it incorporated the 3 m width of the lane itself as part of the 7.5 m set back, so that only 4 m of the setback is on the Subject Site. Council sought to have 7.5 m setback measured from the rear of the Subject Site's property line, so the entire 7.5 m setback was on the Subject Site.
- b. Council also sought that no part of the building would be located above grade within the minimum rear setback distance. The proposal requires that a portion of the building for the garage would be above grade, at 1.43 m.

[5] These changes, in combination with angular plane measurements, have the effect of reducing the building size and height.

[6] The Applicant, Muir Park Development Inc., appealed the Council resolution as a non-decision, as no by-laws came forward to amend the Old or New ZBL.

[7] On behalf of the Applicant, Babak Eslahjou gave opinion evidence in the area of architecture. Ian Graham gave opinion evidence in the area of land use planning.

[8] The City did appear to defend the decision, but without any witnesses.

[9] The Ontario Municipal Board granted, on consent, party status to Desmond Layland. Mr. Layland and his wife reside on the east side of the lane of the Subject Site; specifically at 24 Glengrove Avenue East (a portion of the private road), being the northern most home of the two homes on the east side of the lane ("Layland Property"). The Layland Property is within a Neighbourhoods designation under the City's OP.

[10] On behalf of Mr. Layland, Terry Mills provided opinion evidence in the area of land use planning.

[11] The Laylands are concerned about privacy and overlook. As a result, they supported Council's decision, which would put their property 3 m further from the proposed building than currently proposed. It would also lower to grade the private terraces for two rear units and the rear amenity area at the back of the building, rather than being elevated by 1.43 m as a result of the garage configuration.

[12] After a full review of the evidence, the Tribunal has determined it will allow the Applicant's appeal, but withholds the final decision subject to conditions on consent of the parties.

## **EVIDENCE AND ANALYSIS**

### **Proposal History**

[13] The initial proposal was for an eight-storey rental building with a floor space index ("FSI") of 4.99 (Old ZBL) or 4.64 (New ZBL). Three-bedroom units were very few, consisting of only 3 of the 49 proposed units (6%).

[14] The proposal now before the Tribunal is for a seven-storey rental building of 41 units, of which 11 are to be three-bedroom units (27%). The FSI has been reduced to 4.17 (Old ZBL) or 3.83 (New ZBL), versus an FSI standard of 3.0 under both zoning by-laws.

### **Issues**

[15] When making a decision on a development proposal, the decision maker, whether the Council or the Tribunal, must ensure that the decision conforms to the Growth Plan for the Greater Golden Horseshoe, 2017 ("2017 Growth Plan") and is consistent with the Provincial Policy Statement, 2014 ("PPS"). In addition, the Tribunal or Council must have regard to any applicable provincial interests found at s. 2 of the *Planning Act* ("Act").

[16] Proposed zoning by-law amendments must conform to the City's OP.

[17] As this proposal involves a mid-rise building, the City's Mid-Rise Performance Standards ("Guidelines") are relevant. The Guidelines do not have the force of policy, but seek to advance the vision, objectives and policies of the OP. The Tribunal generally has regard to these or considers consistency with them in its deliberations.

[18] The Tribunal also notes its obligation to have regard to Council's decision, and any material before it at the time of its decision, in accordance with s. 2.1 of the Act.

[19] The Tribunal first considers the issues raised by the Laylands and the use of the lane abutting their property for the rear yard set-back measurement. Thereafter, the Tribunal will consider the relevant OP policies before turning its attention to matters of provincial interest, the PPS and the 2017 Growth Plan, and finally, Council's decision.

### **The Rear Yard Set-back**

[20] A key issue at the hearing was whether the 3 m private lane should be included in the rear set-back measurement. It was the position of the Counsel for the City and the Laylands that the lane should only be included for set-back measurements if it was a publicly owned lane, which this lane is not.

[21] Under the Guidelines for a shallow Avenue property abutting areas designated as Neighbourhoods, the Guidelines seek to establish a transition that has a minimum 7.5 m from the property line and a 45 degree angular plane from a height of 10.5 m above the 7.5 m setback. Regarding this measurement, the Guideline also states the following:

Where a public laneway abuts the site, the laneway may be included for the purposes of establishing the setback and angular plane.

[22] The Guidelines do not define "public" or "laneway". The Guideline statement does not clearly suggest that the laneway has to be publicly owned, simply that it is "public", which could include a publicly accessible laneway, if not a publicly owned laneway. Further, it does not require that the laneway be included in the measurement; simply that it may be, presumably if to do so is acceptable in its context.

[23] Mr. Mills testified that under the Old ZBL for setbacks from the centre of a line of public lane, "public lane" means a public thoroughfare having a width of less than 6 m.<sup>2</sup> There were no other definitions in the Old ZBL for "public" or "lane".

[24] The Tribunal understands that City owned lanes have standards and are usually 6 m in width. It heard no evidence however that privately owned lanes of the same size do not also exist.

[25] Under the New ZBL, there is a definition of "lane" that makes no reference to the width of the lane. It is defined as follows:

A public right-of-way that is not for general traffic circulation.<sup>3</sup>

[26] The New ZBL defines "driveway width"<sup>4</sup>, in part, as the following:

In the Residential Apartment Zone category, a driveway must have:

(A) a minimum width of 3.0 metres for each lane; ...

[27] The use of the defined term "lane" within the definition of "driveway width" would suggest that this is not for only driveways that are publicly owned. In interpreting a term's intended meaning, the whole of the document in which it is used should be considered. An interpretation that is internally consistent would seem to make more sense than choosing an interpretation that is not. .

[28] The private lane in question is used for traffic circulation, but not general traffic circulation, to service the properties it abuts on the east of the lane. The evidence the Tribunal heard is that there is no expectation that it will be or could be redeveloped for any other purpose.

[29] The evidence from Mr. Mills was that the property owners abutting it, including the Laylands, use it to access their driveway at the back of their house. Mr. Mills also testified that the Laylands receive deliveries and mail from the lane.

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<sup>2</sup> By-law No. 438-86, p.4(14).1

<sup>3</sup> By-law No. 569-2013 800.50 Defined Terms (400)

<sup>4</sup> Ibid, 15.5.100.1 General (1)

[30] The Tribunal was given photographic evidence based on Google Streetview images (Exhibit 14) indicating that the lane was private with no trespassing signs posted. The "Private Lane No Trespassing" sign was not there in 2016, 2015, 2014, 2011 or 2009. The sign was there as of February 2018.

[31] The evidence at the hearing was that the owner of the lane appears to be a defunct corporation. As a result, the Tribunal cannot take very much from this signage, other than someone who is not an owner has attempted to exercise the rights of an owner.

[32] The Tribunal understood that the property owners on the east side of the lane have easement rights over the lane. Those with easement rights have a right to access the lane. The owner of the lane cannot preclude them from doing so as a result of those easement rights. The owner could seek to exclude others without easement rights, but those with easement rights cannot similarly exclude others. There was no evidence that the owner has ever attempted to keep other members of the public from using the lane.

[33] The Tribunal concludes that "public lane" in the Old ZBL, "lane" in the New ZBL, or "public laneway" in the Guidelines were probably intended to mean a lane that is used by the public, not necessarily lanes owned by the public, though that they may also be; it further concludes that at the rear of the Subject Site, the lane is publicly accessible and was intended to be used by the public by its owner, notwithstanding that it is privately owned, and notwithstanding the recently installed signage by someone other than the owner attempting to exclude public access.

[34] However, even if this conclusion is incorrect, and the Guidelines did intend to refer to publicly owned - rather than publicly accessible lanes - the Tribunal finds that use of the 3 m lane by City planning staff, for the purposes of the rear yard set-back was consistent with the Guidelines' intent and purpose: this is to provide for a proper transition between the proposed mid-rise building and the abutting owners. In the context of this proposal, City staff felt they could include the 3 m private lane for the set-back measurement. The Tribunal concludes this was a reasonable decision in light of its

current and long-term expected use as a lane. If the lane (whether publicly or privately owned) were at a foreseeable risk of redevelopment such that its transition function would be lost, it may not be appropriate to apply the Guidelines in the same manner. That is not the case here.

[35] Counsel for the City agreed when questioned by the Member that he would not have been able to suggest that the set-back measurement was inappropriate if it was a City owned lane. When asked what would be different in this scenario, he (and the Laylands' planning expert) sought to suggest that if it was a publicly owned lane that this may change the functional use of that lane, though how is unclear. Even as a publicly owned lane, the Tribunal does not see how the use of it would change.

[36] The configuration of this lane all but guarantees that it will be a limited use lane largely used only by the people who would be accessing the properties to the east of the lane. This lane is largely only of use if one is going to the properties it services, unlike some City owned lanes which cross multiple City blocks and could be used as thoroughfares; but even those City owned lanes are by design and purpose "not for general traffic circulation" and are therefore not functionally used, as a general proposition, to get from one part of the City to another even if they could be. Ultimately, the degree to which the lane is used would seem to have no impact on the appropriateness of using it for a set-back measurement for transition concerns. The key issue is that it remain a lane.

[37] Given this situation, this only then begs the question as to why the Tribunal should choose an application of the Guidelines that seems to defeat the functional purpose of including the lane in the set-back measurement for shallow lots, particularly when the City's own professional staff has not seen fit to do so.

### **The Laylands' Concerns**

[38] Regarding the actual context between the Laylands and the proposed new building, the evidence in this case was that the principal windows from Laylands'



property are 14.5 m away from the Subject Site's property line, including the 3 m lane, which is 4.5 m more than what the Guideline suggests as a minimum.

[39] While the Tribunal was urged to find otherwise, as the Applicant's counsel noted, City staff took great care to ensure that the relationship between the Laylands and the new building was sufficiently sensitive to the adjacent residential users. Specifically, the following are drawn from the staff report (Exhibit 2, Tab 11, page 9):

- a. The rear building façade was redesigned so the height of the portion of the building above grade was reduced to three storeys from four;
- b. The number of rear balconies was reduced to three and only on the fourth floor;
- c. Outdoor space for the remaining floors above the fourth floor are provided in the form of terraces as a result of the building being designed to fit within the angular plane;
- d. The seventh floor will be set back 14 m from the rear (east) lot line;
- e. Regarding the parking garage extending 1.4 m above grade at the rear of the building,<sup>5</sup> where there will be outdoor amenity space on the roof area of the garage, it will be screened and a one metre tall wrought iron fence was proposed.<sup>6</sup>

[40] Mr. Eslahjou testified that regarding the angular plane, City staff did not accept the initial iteration proposed by the Applicant which did not respect that plane and required the Applicant abide by it. The proposal was redesigned as a result.

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<sup>5</sup> The Tribunal heard evidence from Mr. Eslahjou that this was the most efficient design for the parking structure, which will also use stacking technology. If the design continued with a ramp, this would have resulted in space for around 60 percent of the cars that the proposed design accommodates.

<sup>6</sup> At the appeal hearing, the Tribunal heard reference to a permeable fence.

[41] Regarding the two private terraces at the back, these are proposed to be screened by trees.

[42] There will be no loading at the rear, nor will there be any vehicular access to the proposed building from it.

[43] The Tribunal did not hear any evidence that the back of the Laylands' home was used for recreational purposes, such that they were spending any significant amount of time there, and in that sense, the relationship between the proposed building and the Layland's home is more like a "side" to rear condition, though obviously not a true side condition.

[44] In sum, the Tribunal concludes that the Guidelines have been appropriately applied. In this, it adopts the evidence of Mr. Graham, that the proposal is consistent with the Guidelines. The Tribunal easily concludes they have been appropriately regarded to.

### **Official Plan**

[45] It was Mr. Graham's opinion that the proposal conformed to the OP.

[46] Under the OP, growth is to be directed to Centres, Avenues, Employment Areas and the Downtown (Policy 2.2.2). As noted, this proposal is on an Avenue, near to the subway at Lawrence Avenue and Yonge Street. The proposal responds to the policies at 2.2.2, which seek to use municipal land infrastructure and services efficiently and concentrate people in areas well served by transit. By offering housing opportunities well served by transit, the proposal can support the goals of improving air quality and reducing greenhouse gas emissions.<sup>7</sup>

[47] The policies at 2.2.3 are specifically directed to Avenues and the re-urbanization of arterial corridors and new housing and job opportunities are encouraged here.

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<sup>7</sup> In addition to the subway at Lawrence and Yonge, a future rapid transit line will also be available to the south at Eglinton.

[48] The Applicant completed an Avenue Study under these policies (2.2.3.3) to assess the incremental development, the impacts on the adjacent Neighbourhood, whether it was supportable by available infrastructure, and if any amendment was required to the OP or to the applicable zoning by-laws. No OP Amendment was required.

[49] Mr. Mills conducted a study of rear-to-rear transitions along main streets. He concluded that while the Subject Site's relationship to the Neighbourhood was not unique, it was rare.

[50] The Member understood from this evidence that the Tribunal should therefore find it does not satisfy the necessary test for an appropriate relationship between the mid-rise building and the adjacent homes. However, the Tribunal cannot do so, for the reasons already articulated above. The Tribunal finds that the transition provisions are appropriately addressed by the proposal and conform to the OP policies that apply and adopts Mr. Graham's opinion in doing so.

[51] The policies at 2.3.1, referred to as the Healthy Neighbourhoods policies, address developments in Mixed Use Areas that are adjacent to Neighbourhoods. Policies at 2.3.1.2 require that developments in Mixed Use Areas will be compatible with those Neighbourhoods; allow for a gradual transition of scale and density through the stepping down of buildings towards and setbacks from those Neighbourhoods; maintains adequate light and privacy of residents in the Neighbourhoods; and attenuates traffic and parking impacts on the adjacent neighbourhood streets.

[52] Policy 2.3.1.3 indicates that intensification of land adjacent to neighbourhoods will be carefully controlled to ensure they are protected from negative impact.

[53] Only Mr. Graham gave an opinion on the policies at 2.3.1. The Tribunal adopts that opinion and finds the proposal conforms to the foregoing policies.

[54] The policies at 3.1.2 deal with built form. The Tribunal adopts the opinion of Mr. Graham that the proposal conforms to these policies by locating and designing the

proposed building to fit within both the existing and planned context; by locating and organizing the vehicle parking and access, service areas and utilities to minimize impact on the property and surrounding properties; and by massing and designing the exterior façade to fit harmoniously into its existing and/or planned context. The Tribunal finds the proposal provides for appropriate amenity spaces and is massed to define the edges of the street it fronts onto.

[55] The proposal is for rental housing, which will contribute to the City's rental housing stock, and therefore responds to the OP's housing policies (Policy 3.2.1.1 and 3.2.1.3). It creates new housing stock through intensification (Policy 3.2.1.2). The Tribunal finds the proposal conforms to these policies.

[56] Finally, the policies at 4.5 address Mixed Use Areas. The policies under this section seek to address numerous issues, including, of most relevance to this appeal, the following:

- a. A balance of high quality commercial, residential, institutional and open space which reduces car dependency and meets local community needs;
- b. New jobs and homes on underused lands;
- c. Locating and massing new buildings to provide appropriate transitions between areas of different development intensity, including and particularly to lower scale Neighbourhoods;
- d. Locating and massing new buildings so as to adequately limit shadow impacts on adjacent Neighbourhoods, particularly during the spring and fall equinoxes;
- e. Access to schools, parks, community centres, libraries and childcare;
- f. Taking advantage of nearby transit;

- g. Good site access and circulation and adequate supply of parking for residents and visitors; and
- h. Amenity space for building residents.

[57] Mr. Eslahjou produced a shadow study and testified that the shadows generated by the proposed building on adjacent properties, including the Layland Property, were adequately limited. The Tribunal adopts this opinion and agrees with the submissions of the Applicant's counsel that this is so whether one references the shadow studies of the Applicant (which City staff was satisfied with) or those provided by Mr. Mills.

[58] In sum, the Tribunal concludes that the proposal conforms to the above policies and conforms to all the applicable policies of the OP.

#### **Provincial Matters, Policy and Plans**

[59] Both Mr. Graham and Mr. Mills were in agreement that the proposal is consistent with the PPS and conforms with the 2017 Growth Plan. The Tribunal has no difficulty concluding the same, and further, that the proposal has regard to the matters of provincial interest itemized at s. 2 of the Act which are a high level reflection of many if not all of the key goals itemized in the PPS and 2017 Growth Plan.

#### **Council Decision**

[60] The Tribunal has had regard to the Council's decision and the staff planning report before it at the time of its decision. In light of the Tribunal's findings in this matter, the Tribunal concludes it must allow the appeal.

#### **ORDER**

[61] The Local Planning Appeal Tribunal allows the appeal regarding the requested amendments to Zoning By-law No. 438-36 and Zoning By-law No. 569-2013, but withholds its order pending the following:

- a. confirmation from the parties that the City Solicitor is satisfied with the final form of the zoning by-law amendments and upon receipt by the Tribunal of the final form of the zoning by-law amendments; and
- b. submission by the Applicant/Owner of a revised Functional Servicing Report including a Hydrogeological Report to the satisfaction of the Executive Director, Engineering and Construction Services.

*"Paula Boutis"*

PAULA BOUTIS  
MEMBER

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**Local Planning Appeal Tribunal**

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