

Ontario Municipal Board
Commission des affaires municipales
de l'Ontario



ISSUE DATE: March 14, 2017

CASE NO(S): PL151047

PROCEEDING COMMENCED UNDER subsection 22(7) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant and Appellant: 9218 Yonge Street Incorporated
Subject: Request to amend the Official Plan - Failure of Town of Richmond Hill to adopt the requested amendment

Existing Designation: Key Development Area
Proposed Designated: Key Development Area
Purpose: To permit a mixed use, commercial/residential high density development

Property Address/Description: 9218 Yonge Street
Municipality: Town of Richmond Hill
Approval Authority File No.: D01-15003
OMB Case No.: PL151047
OMB File No.: PL151047
OMB Case Name: 9218 Yonge Street Incorporated v. Richmond Hill (Town)

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

Applicant and Appellant: 9218 Yonge Street Incorporated
Subject: Application to amend Zoning By-law No. 2523 - Refusal or neglect of Town of Richmond Hill to make a decision

Existing Zoning: General Commercial One
Proposed Zoning: Key Development Area
Purpose: To permit a mixed use, commercial/residential high density development

Property Address/Description: 9218 Yonge Street
Municipality: Town of Richmond Hill
Municipality File No.: D02-15013
OMB Case No.: PL151047
OMB File No.: PL151048

Heard: February 7-16, 2017

APPEARANCES:

Parties

Counsel

Town of Richmond Hill

Chris Barnett

9218 Yonge Street Incorporated

Jeffrey Streisfield

DECISION OF THE BOARD DELIVERED BY GERALD S. SWINKIN

INTRODUCTION

THE APPEALS

[1] There are two matters before the Municipal Board (the “Board”) under this case. The Owner, 9218 Yonge Street Incorporated (the “Appellant”), has brought an appeal to the Board under the provisions of subsection 22(7) of the *Planning Act* (the “Act”) by reason of the failure of the Council of the Town of Richmond Hill (the “Town”) to amend the Town Official Plan (the “OP”) in order to permit the mixed use, commercial/residential high density development as proposed by the Appellant (which will be more particularly detailed below). The Appellant has also brought an appeal to the Board under the provisions of s. 34(11) of the Act by reason of the failure of the Council of the Town to act on the Appellant’s companion application to amend the applicable Zoning By-law No. 2523, as amended, in order to permit the proposed development.

THE APPELLANT’S PROPERTY

[2] The Appellant’s property is municipally known as 9218 Yonge Street, in the Town of Richmond Hill (the “Property”). The Property is located at the southwest corner of Yonge Street and Carrville Road. As it runs east from Yonge Street, Carrville Road is known as 16th Avenue. Both Yonge Street and Carrville Road/16th Avenue are roads under the jurisdiction of the Region of York.

[3] The Property has a site area of 7,382.5 square metres and is presently improved with two one-storey buildings accommodating retail uses and served by parking at grade.

THE APPELLANT'S PROPOSAL

[4] The Appellant's proposal is for the development of a mixed-use building with a six-storey podium and two towers above. There is proposed to be ground floor retail and office commercial uses in some portion of the podium floor area. The balance of the floor space would be for residential use, ultimately subject to a condominium regime.

[5] The concept of the development was put before the Board in the form of a site plan, various floor plans, a landscape plan and various elevation and section drawings. Although the Town would have seen these drawings, there was no suggestion that a formal site plan application has yet been filed with the Town or that there are any formal Town or agency comments on the proposed site plan.

[6] Based upon the statistics put before the Board in the hearing, the building would comprise 39,897.9 square metres of total gross floor area, of which 37,387.1 square metres would be residential and the balance non-residential. The proposed building would have a lot coverage of 28.99 per cent and a Floor Space Index ("FSI") of 5.4. The suggested number of residential units is 500.

[7] The towers are proposed as point towers, each with floor plates not exceeding 700 square metres. The southeasterly tower, which fronts Yonge Street, is proposed as 23 storeys above the podium, therefore resulting in a structure which comprises 29 storeys. It is proposed to have a height of 91.15 metres. The northwesterly tower, which fronts Carrville Road, is proposed as 18 storeys above the podium, therefore resulting in a structure which comprises 24 storeys.

[8] At grade, there is proposed to be an open plaza at the northeast corner of the Property, being at the intersection of Yonge Street and Carrville Road. There will be a

certain measure of visitor parking at grade (with additional visitor parking in the underground garage), internal circulation driveways and covered bicycle parking (with further bicycle parking provided in the underground garage). There appears to be three levels of underground parking in the proposed structure. Parking is proposed to be provided based upon the reduced standards which now apply to what is known as a Key Development Area and also based upon a principle of mixed use shared parking. The proposal here is to provide 580 parking spaces on the Property.

THE AREA CONTEXT

[9] Essential to an understanding of the issues in this case and to an analysis of the relevant and operative planning objectives is an appreciation of the identification of what is known in the OP as the Yonge Street and 16th Avenue Key Development Area (the “KDA”).

[10] The KDA is centred around the intersection of Yonge Street and 16th Avenue/Carrville Road and was approached by the planning and other witnesses as quadrants related to that intersection.

[11] The Property is located in the southwest quadrant. Included in this quadrant, south of the Property down to Spruce Avenue, are three properties with low profile commercial use buildings fronting Yonge Street. To the west of the Property are residential properties with considerable depth from Carrville Road. The Appellant’s planner advised that there has now been an assembly of some eleven of these properties (39-97 Carrville Road) and that the new owner has been advancing a proposed redevelopment similar in nature to that being advanced by the Appellant, a mixed-use proposal in the form of towers on a podium. That owner’s representatives did make a submission to the Town’s Committee of the Whole at its meeting on January 23, 2017 in connection with consideration of a Staff Report regarding this KDA, which submission did reflect an intention to pursue the required official plan and zoning amendments for redevelopment purposes.

[12] The northwest quadrant of the KDA is wholly occupied by a single user, which is known as the Hillcrest Mall. The Hillcrest Mall is a regional shopping centre. Oxford Properties Group acts as property and development manager for the owners of the shopping centre property. Mr. Estrela from Oxford Properties Group appeared at the hearing and testified on behalf of Oxford Properties Group as a Participant. He is in-house counsel to Oxford Properties Group. He advised the Board that the shopping centre sits on a 43 acre parcel of land and presently comprises about 600,000 square feet of leasable floor area. Further details as to his testimony will be addressed later in this decision. The Board simply notes at this juncture that the northwest quadrant is by far the largest of the four quadrants by territorial extent.

[13] The northeast quadrant is also occupied by a shopping centre, the South Hill Community Shopping Centre. This would be the second largest quadrant by territorial extent.

[14] And finally, the southeast quadrant, which is similar in territorial extent to the southwest quadrant. This quadrant became the flashpoint for the engagement of the issues in this hearing, and was heavily relied upon by the Appellant's witnesses for the justification of its proposal. At the northwest corner of the quadrant is the Haulover Investments Ltd. site (the "Haulover site"). The Haulover site presently accommodates a four-storey commercial development with ground floor retail and office uses above. However, this site was the subject matter of an appeal to the Board in 2010 under Board Case No. PL101255 that resulted in a decision of the Board issued on October 28, 2011 (the "Haulover Decision").

[15] The Haulover Decision, as was the case in this instance, proceeded from a failure of Town Council to adopt a site specific amendment to the OP and a zoning amendment of the Haulover site. In addition to being situated at a corner of the intersection of these two Regional arterial roads, the Haulover site was very similar in size to the Property, being described as 0.7590 hectares. Based upon the planning policy framework as it existed at that time and the totality of the evidence heard by that panel of the Board, the Haulover Decision allowed the appeals and authorized a mixed-

use development on the Haulover site based upon a six storey podium and two towers, one to a maximum of 28 storeys or 94 metres in height and the other to 24 storeys. The permitted FSI was set at 5.4. As is noted above with respect to the present state of the property, despite this approval, the redevelopment has not yet occurred.

[16] The other notable parcel in this quadrant is that which lies just south of the Haulover site. This is known as the Great Land site (the “Great Land site”). This parcel was also the subject of appeals to the Board but was disposed of by Order of the Board under Case No. PL090106 in 2010 further to a settlement between the Town and the owner. That development has proceeded and is nearing completion. It consists of two 11-storey buildings, a 20-storey building and a 24-storey building. Those buildings transition in height from the south limit of the Great Land site, with the tiered 11-storey buildings most southerly, which abut a three storey townhouse form of project lying to the south just outside the KDA. The total gross floor area on the Great Land site is reported to be 71,555 square metres and the resultant FSI is 3.99.

[17] Although the area beyond the KDA is primarily low rise residential in built form, there are at least four properties further south on Yonge Street which accommodate high rise residential development on the order of 14 and 15 storeys.

WHAT THE BOARD MUST “HAVE REGARD TO” AND “THE CLERGY PRINCIPLE”

[18] Apart from some neutral background evidence provided at the outset of the hearing by the Appellant’s consulting land use planner, who then stepped down to be recalled later to offer his opinion evidence, the Appellant’s first witness was also a qualified land use planner but was put forward on the basis of providing urban design evidence. His evidence in chief took up most of the first day of the hearing. Shortly into the cross-examination of this witness, Appellant’s counsel rose to object to the pursuit of a line of questioning by Town counsel on the basis that the evidence to be adduced was to emanate from a Town Staff Report which should not be before the Board. The report in question was referred to above, being the one which was considered at the Town Committee of the Whole meeting on January 23, 2017. It is styled as “Yonge Street and

16th Avenue Key Development Area Policy Directions and Recommendations Report” (the “PDR Report”). The purpose of the PDR Report was to have Town Council endorse the directions in the report to prepare the 16th Avenue KDA Secondary Plan and, in addition to application of the Part 1 OP policies, to utilize the PDR Report in the review and evaluation of development applications within the area until such time as Council adopts a Secondary Plan for the 16th Avenue KDA.

[19] Appellant’s counsel took the position that allowing the introduction of the PDR Report into evidence (despite the fact that it had been entered in evidence at the outset of the hearing as part of the Town Document Book) would be unfair, prejudicial and contrary to the *Clergy* principle as enunciated by the Board in its 1996 decision, *Clergy Properties Ltd. v. Mississauga (City)*, [1996] 34 O.M.B.D. No. 1840; 34 O.M.B.R. 277, and in decisions subsequent thereto. In Appellant Counsel’s submission, allowing the proposal to be tested against standards which had not yet proceeded fully through statutory process and had become approved policy was tantamount to subverting the scheme of the Act and would subject his client’s proposal to standards that had no proper authority and would therefore be entirely unfair process.

[20] In response, Counsel for the Town directed the Board to the provisions of s. 2.1 of the Act. This provision was introduced into the Act in 2006, after the *Clergy* decision. The relevant clause of ss. (1) of that section, clause (a), reads: “When an approval authority or the Municipal Board makes a decision under this Act that relates to a planning matter, *it shall have regard to* any decision that is made under this Act by a municipal council or by an approval authority and relates to the same planning matter” (italics added).

[21] Section 2.1 really codifies what the Board’s jurisprudence had already factored in to the application of the *Clergy* principle as it concerned the evolution of policy. A particularly clear and articulate enunciation of the principle’s application is as pronounced in the decision of Member, Bruce Krushelnicki (as he then was) in *James Dick Construction Ltd. v. Caledon (Town)*, 2003 CarswellOnt 6221 (OMB Case No.

PL000643, issued November 25, 2003). The relevant paragraphs of that decision are reproduced here:

Having considered the lengthy submissions of counsel for the parties to this motion, the Board concludes that what we commonly refer to as the “*Clergy* principle” as modified by *Dumart*, remains a useful doctrine and practice. It should continue to serve as a firm guide when faced with the question of which policies should be used to evaluate an application in those infrequent cases where the policy environment pertaining to the application has changed before the application could be finally decided. It is a practice that promotes fairness, consistency and predictability — all of which are of value to the planning process and to all participants in that process.

In short, people should continue to expect that the policies that are in place when they apply will be made to apply to them. In the vast majority of cases, this should continue to be the practice of the Board as it has been in the past.

However, it must also be acknowledged that the *Clergy* principle is not a law or an inviolate rule. It is a practice meant to promote fairness in the planning process. Even so, there are occasions where fairness conflicts with other values that may be of equal, or in some cases, much greater importance to the planning process, and while abandoning a fair practice may result in some prejudice to one party, this must be weighed in the balance against the other values that are at stake.

The Board agrees with the Town in its interpretation of the meaning that underlies the *Clergy* principle. On its face, *Clergy* appears to stand for the proposition that an application should be judged by the policies that exist at the time that the application is filed. But more deeply, as the court acknowledged in its reasoning, the case stands for the proposition that the Board has the authority to formulate a procedural policy such as the *Clergy* principle and that it is uniquely equipped to judge those circumstances in which it is appropriate to apply it and, by corollary, when it is appropriate to set it aside.

The court said the following in its ruling upholding the Board’s determination in the *Clergy* case:¹

In carrying out its mandated duties, the OMB has exclusive jurisdiction to determine the scope of the issues before it, the procedures to be followed, and the appropriate policy choices to be made and applied in order to arrive at sound planning decisions.

In short, the Board is authorized to conclude when it is fair to apply the *Clergy* principle and should undoubtedly do so in the vast majority of cases. And equally, it has the authority to conclude when the circumstances of a case warrant the application of another principle. For instance, it may choose in its procedural discretion to consider and apply more recent policies and more modern standards that are consistent with a compelling public interest.

¹ *Greater Toronto Airports Authority v. Clergy Properties Ltd.* O.C.J. (Divisional court) File 3/97, p. 3.

To conclude otherwise is to require that current practices and policies, no matter how reasonable, must be ignored or given so little weight as to be made virtually trivial, in all cases where the date of the application precedes them. This would amount in some cases to a willful blindness that would prevent the decision-maker when determining the merits of an application - even where it is reasonable to do so — to apply criteria, standards and tests that are based on the most current research and information.”

[22] It is acknowledged that the policy which the Board was considering in the *James Dick* case was not policy in evolution but rather an official plan amendment relating to aggregate which had been adopted by Town Council and approved by the approval authority. The issue was that that official plan amendment was only approved in 2003, approximately a year before the appeal hearing but some approximately five years after the filing of the application which was then under appeal before the Board.

[23] The PDR Report here is not approved policy. It is a step in the evolution of what is intended to become approved policy and is a matter of record of Council's position on the various land use issues which are treated in the Report and appended Study. It is yet subject to the full obligation of consultation and public input and is not pre-determined in its final outcome. However, in coming before the Town's Committee of the Whole and then Council, and in being endorsed as setting the direction for the preparation of the Secondary Plan, it directly bears upon the matters which are before the Board in this hearing and is therefore relevant.

[24] In this instance, the Board treats the PDR Report and its adoption/endorsement by Town Council as relating to the same planning matter as that which is before the Board in these appeals, the application and interpretation of the policy concerning the KDA within which the Property is located. The Board fully recognizes that none of the directions or recommendations in the PDR Report can be treated as in-force policy or as having the character of official plan policy yet for Act purposes. However, those recommendations and directions may shed light on the intent of the more general policy which is embodied in the KDA policy provisions in the in-force OP and be of value to the Board in so interpreting that document.

[25] Interestingly, the Appellant's urban design witness clearly conceded in cross-examination that he treated it as his duty to be aware of new policy directives and that he had given full consideration to what was set out in the PDR Report. In fact, as a late modification to the proposal, which was apparently advanced only prior to the Board hearing, allowance for a pedestrian walkway was added to the plan. This amounted to a mark-up of the site plan to reflect a potential 1.5 metre allowance at the south edge of the Property, to be joined with a similar 1.5 metre strip from the abutting parcel to the south, in order to create a three metre path for pedestrian and cyclist use. This related to the policy directive for connectivity and a fine grained road network, which manifested itself in the PDR Report in the form of a potential 18 metre wide public road likely impacting the southern edge of the Property. This proposed road as an 18 metre public road emerged explicitly in the PDR Report but, as will be discussed below, it was prefigured in prior Study material before Council. All three of the Appellant's witnesses rejected the need for such a road and counsel for the Appellant strenuously resisted any provision for such a road, both on the basis of lack of need and that as the secondary plan review and approval process was not complete, most particularly the next phase of consultation, there was no basis to treat this as a final policy or having any force in law.

[26] Despite Appellant counsel's submissions, the Board treats s. 2.1 of the Act as requiring the Board to hear the evidence about Council's decision on this matter and then have the appropriate regard for it as the circumstances all together dictate in accordance with the dictum in *James Dick*. To borrow from the concluding paragraph of the extract of that decision above, especially in light of the current statutory mandate of s. 2.1 of the Act, the Board does not find it appropriate to wilfully blind itself, when determining the merits of this application, to criteria, standards and tests that are based on the most current research and information.

THE PLANNING POSITIONS OF THE PARTIES

[27] There was no disagreement between the Parties that the Property should be redeveloped for mixed-use purposes. There was also no disagreement between the

Parties that this was meant to be a site for deployment of high density development in a tall building form.

[28] The disagreements fell primarily into three categories. In descending order of importance, those three categories were: 1) the appropriate density to be deployed on the Property; 2) the height of the building which should be permitted on the Property; and 3) whether allowance should be made for the future establishment of a public road at the southern edge of the Property.

[29] Both sides addressed the policies and dictates of the Growth Plan for the Greater Golden Horseshoe (the “Growth Plan”) and the Provincial Policy Statement (the “PPS”). In the Board’s view, both sides acknowledged that provincial policy, through these instruments, required intensification and expected both the upper and lower tier municipalities to implement this obligation in their respective official plans. In the instant case, the Region of York, through its 2010 Regional Official Plan (“ROP”) has implemented a land use framework to 2031 which conforms to the Growth Plan and is consistent with the PPS. The ROP designates Yonge Street as a Regional Corridor and as a Regional Rapid Transit Corridor and Subway Extension. The intensification policies of the ROP, as set out in s. 5.3 and 5.4, set up a framework which differentiates types of intensification based on Regional Centres, Regional Corridors, transit terminals, local centres and corridors and infill. Based upon the Regional Structure Map 1 as it relates to the Town, the area of highest intensification, the Regional Centre, is the Richmond Hill Centre, located south on Yonge Street at Highway 7. This is followed in the hierarchy by the Regional Corridors (which run along Yonge Street and Highway 7). Section 5.4.31 declares that the most intensive and widest range of uses with the Regional Corridors be directed to specific intensification areas identified by local municipalities as key development areas. The Town has acted on that policy imperative by establishing the KDA (as well as one further key development area further north on Yonge Street which is not germane to this appeal).

[30] Section 5.4.33 of the ROP, in keeping with the growth expectations and minima directed by the Growth Plan, stipulates that minimum densities for key development

areas be established within secondary plans consistent with specific numeric FSI for lands in proximity to higher order transit facilities and for lands at or adjacent to other rapid transit stations or other select areas, at an appropriate FSI in consideration of community context and character. This setting of FSI, however, is subject to ensuring fidelity to the mandate of the Growth Plan to actually accommodate the directed growth, by s 5.4.34 of the ROP, which requires key development areas to support an overall long term density of 2.5 FSI for developable areas.

[31] It is at the Town OP level that the Parties took off in entirely different directions.

THE APPELLANT'S PLANNER'S VIEW OF THE TOWN OP AND THE RELEVANT PLANNING CONSIDERATIONS

[32] The Appellant's planner canvassed various of the Urban Framework and Urban Design policies in s. 3 of the OP. He drew specific reference to s. 3.4.1.55, which deals with ensuring built form compatibility and transition of building heights with adjacent low density residential and medium density residential areas and development within the centres and corridors. The policy is aimed at achieving appropriate skyview, light and separation for the low density area. The tool employed is the construction of a 45 degree angular plane from the edge of the low density area toward the higher density development. The higher density development is not to penetrate the angular plane. This has the effect of controlling the height of the high density development. The planner was of the view that this was the appropriate method of determining acceptable height. Drawings were produced, with the point of departure of the angular plane being set at the limit of 20 Spruce Street, to demonstrate that the proposed building on the Property conformed with this policy.

[33] Although he transcribed the entirety of s. 4.4 of the OP into his Planning Justification Report as the applicable policies of the KDA land use designation, the planner then went on to declare in his report that the height and density limits of these KDA policies have been superseded by the Haulover and Great Lands approvals on the

east side of Yonge Street. He asserts that the proposal on the Property is consistent with those approvals and within the boundaries of the KDA.

[34] Section 4.4.8 of the OP declares that the following height requirements shall apply to development in the KDA:

1. A minimum building height of three storeys
2. A maximum base building height of six storeys
3. A maximum building height of twenty storeys; and
4. The tallest buildings shall be directed towards the intersection of Yonge Street and Carrville Road/16th Avenue

[35] Despite the alleged applicability of this policy to the Property, no effort is made by the Appellant's planner to discern its intent or explain conformity in the face of a nine-storey difference other than the assertion that the policy is superseded by the two prior Board decisions.

[36] Section 4.4.6 of the OP indicates that the density of a development block within the KDA shall be a minimum of 2.5 FSI and a maximum of 3.0 FSI. It then goes on to say that the boundaries of development blocks shall be identified in a Secondary Plan. The planner took the position in his witness statement and in his testimony before the Board that as there was neither a Secondary Plan nor a development block defined within it yet, there was no density limit applicable to the Property and that the appropriate reference point for density was the Haulover and Great Land parcels.

[37] Of course, the planner completely dismissed the relevance of anything in the PDR Report as it was not yet approved policy and felt no compunction about responding to the apparent direction of Town Council.

[38] The Board finds the approach adopted by the Appellant's planner improperly dismissive of approved and evolving policy, and far too simplistic in simply seizing on precedent without regard for planning framework context and chronology.

THE TOWN PLANNER'S VIEW OF THE TOWN OP AND THE RELEVANT PLANNING CONSIDERATIONS

[39] The Town's planner was very familiar with the relevant planning documents as he had been engaged as part of a consultant team in the preparation of a background planning document for the OP in 2009, the Housing and Residential Intensification Study, and was also the lead author of the PDR Report.

[40] The Town's planner essentially urged the Board to step back and understand the Appellant's application and KDA policies in light of the broad urban structure which has been adopted by the Town to govern its development. This is reflected in the image of an inverted pyramid in s. 3.1.3 of the OP, the Urban Structure Framework policies. At the top of the pyramid is the most intense level of development, the Richmond Hill Centre. It is identified in s. 3.1.3.7 as the primary intensification area of the Town with the greatest range of uses concentrated around an integrated transit hub. Section 4.2.1 of the OP identifies development blocks within Richmond Hill Centre and specifies maximum densities and building heights for them. The greatest height and density is to be located at the Integrated Transit Hub Station. The density range for this block is a minimum of 3.5 FSI to 6.5 FSI, with a maximum building height of 40 storeys. The development blocks which move away from the hub have densities which range from a minimum of 2.0 FSI on up to 5.0 FSI. Maximum building height tends to be 15 storeys.

[41] The next tier down in the hierarchy are the Key Development Areas and Regional Corridors, followed by the Local Centres and on down. His view is that the levels in the hierarchy should remain distinctive and within their defined density and height limits in order to reflect the intention of a clear and apparent urban structure. This relates to the notion of a vision of the community as manifested in physical form. He referred the Board to a figure in the OP illustrating the topic of Building a Strong, Vibrant Identity and Character. And in referring to that figure of the conceptual skyline of the Town as seen along Yonge Street, he referred to the nodes of development as

pulses of height and density which have a relationship to each other arising out of the planned urban structure.

[42] By allowing density on the Property at 5.4 FSI and height at 29 storeys, he fears that this will undermine the intended urban structure and potentially undermine the comprehensive planning within the KDA itself as an undue density would be allocated to the site, presumably at the expense of other lands within the KDA.

[43] The opinions advanced by the Town's planner have a theoretical consistency to them but the theory doesn't neatly marry with the realities on the ground. Firstly, as persistently advanced by the Appellant, the KDA now has, almost at completion, a 24 and 20-storey building on the Great Land site and an approval for a 28 and 24-storey building on the Haulover site. Even at these heights, such buildings will not surpass the maximum height which is prescribed for the core of the Richmond Hill Centre.

[44] But more importantly, in the course of questions posed by the Board to the Town's planner, it surfaced that as part of the background work in preparing the PDR Report, certain presumptions as to development were made and allocations of density ascribed to the quadrants. It seems that the Property was treated as having a development potential to yield 424 residential units. The standard apparently used for generation of floor area for this exercise was 90 square metres per unit. That then works out to an allocation to the Property of 38,250 square metres. The data for the proposed building on the Property indicates 37,387.10 square metres for residential use. So, the Appellant's sought after density, despite computing to 5.45 FSI, meshes with estimations being used by those providing advice to Town Council.

[45] But apart from that admission from the Town planner, the Board has a broader concern about the intensification mandate and its achievement. The KDA policy is to achieve an FSI of 2.5 KDA-wide. This depends upon build out among the quadrants to a level that will achieve the overall goal. As advised by the Town planner, there seems to be an allocation/expectation of 350,000 square metres of gross floor area for the northwest quadrant, being the quadrant occupied by the Hillcrest Mall. Based upon the

evidence of Mr. Estrela, as noted earlier in this decision, the present floor area of this regional shopping centre is 600,000 square feet. That converts to 55,742 square metres. Based on the land parcel area, the current FSI is 0.32795. Mr. Estrela also advised that the current focus of the mall ownership is to enhance the retail experience generally in the current format. There are anticipated expansions. Although the mall ownership have directed a master plan for the ongoing management and development of the mall property, Mr. Estrela suggests that the 10-20 year horizon for that plan does not necessarily involve the magnitude of mixed use development which seems to be implicit in the Town's background projections.

[46] The Board believes it to be significant that Mr. Estrela was here to confirm to the Board that Oxford Properties Group is supportive of the Appellant's proposal and views it as consistent with the KDA development vision and that it can only help to support the commercial function within the KDA. There was no expression of concern about prejudice to their development potential or any serious concern about impacts arising from the proposed development.

[47] In fact, no other person appeared at this hearing to suggest prejudice to development entitlement or impact from the Appellant's proposal.

[48] Accordingly, the Board arrives at the conclusion that there is no real threat to the OP policies regarding excess of density in this KDA as a result of the proposal. It is conceivable that the threat will be more in the nature of failing to achieve the targeted density for the KDA.

HEIGHT

[49] With respect to height, the Board is also not persuaded that the urban structure will be irretrievably compromised as a result of permitting a building of 29 storeys at this intersection. The proposed building has been designed to present a slender profile on the skyline and it will not be out of character with the tall buildings which are in existence or authorized in the immediate vicinity. In that regard, the Town planner

spoke of abrupt transition in building height as creating an unacceptable condition. The Hillcrest Mall is a low profile structure. Mr. Estrela expressed no issue with respect to the juxtaposition of the towers to the mall. The Great Land buildings apparently co-exist with the adjacent three storey townhouses, and those townhouses with the apartment buildings to the south of them. With application of the angular plane, any potential material impacts can be controlled.

[50] On this latter point, the Board has specific regard for a position on height which was set forth in the Background Research document dated April 13, 2016, which was updated on April 26, 2016 (the "Background Research document"), which was authored by the Town's planner and his consultant team. This document provided background research and posited three draft land use scenarios for public consultation in the KDA secondary plan preparation process. The scenarios range from less intense built form to more intense built form. On the page which lists the commonalities in all draft scenarios, the matter of building height is addressed. Mid-rise buildings are suggested to be generally four to six storeys in height. Tall building height though is expressed to be controlled by a 45 degree angular plane from adjacent neighbourhoods. In fairness, each of the following three scenarios has a building height plate which identifies the "tall building zones" (within which the Property lies in all three of the scenarios) and it carries a tag reference of 9-20 storeys. Some ambiguity therefore arises from the material before Town Council.

[51] The Appellant's urban design planner took the position that control by storeys was an imprecise measure in any event as there is variation in storey height in the design and construction of buildings, most particularly as between buildings for residential use and office use. The buildings proposed here are a case in point. The residential storeys are 2.95 metres in height but the ground floor commercial storey height is 4.5 metres. His advice is that a 4.5 metre storey height for commercial use is not atypical. Consequently, there may be a significant difference in metric height between a 20-storey residential building and a 20-storey commercial building.

[52] On the weight of the whole of the evidence, the Board is of the view that on the Property, height can adequately be controlled by the 45 degree angular plane together with the controls on density, setback and parking which will be incorporated in the zoning by-law. There is no need to describe a control based on storeys.

THE NEW PUBLIC ROAD

[53] Permitted density was a point of great contention between the Parties. Equally, protection for a new east/west road at the south edge of the Property generated a fierce opposition of views.

[54] Put simply, the Town advances the view that the OP, as it relates to the KDA, speaks to the principle of connectivity within the KDA and to the development of a “fine-grained road network”, part of the function of which is to create a walkable and connected pedestrian and cycling environment in the area and also to facilitate access to buildings which will be part of the redevelopment of the KDA, and thereby relieve some of the turning movements which are now occurring on the arterial roads that serve the area. The Town says that the principles are laid out in the OP and that the details of implementing those principles will emerge in the development and finalization of the secondary plan for the KDA. In this regard, they say that although the Appellant has a right to bring this appeal, it is brought in the process of a comprehensive overall planning exercise which has not concluded and is therefore premature. They allege that the Appellant has not properly and fairly considered the broader context of the KDA and the vision articulated in the OP and is singularly focussed on the Property to the exclusion of the potential impacts of the proposed development on the comprehensive planning exercise.

[55] With Town Council endorsement of the PDR, there is now an explicit direction to contemplate the creation of an east/west local road from Yonge Street westerly to the proposed new north/south road and beyond. This road is shown conceptually in the vicinity of the southern edge of the Appellant’s Property. It will be referred to henceforth as “the east/west road”.

[56] The east/west road is referenced in the first bullet point under the topic of Streets and Blocks within s. 3.3 of the PDR and illustrated on Figure 39 on the same page as the text. This is purely a conceptual reference, in both textual and illustrative terms, locationally and dimensionally.

[57] The Town's transportation witness, its Director of Development Engineering and Transportation, advised the Board that the intent of the recommendation in the PDR is to establish a public road with an 18 metre right-of-way for this east/west road. It is meant to connect with the north/south road at a point of intersection with the westerly extension of the road from the north/south road, which westerly segment was generally fixed. It appeared from the evidence that the precise alignment of the east/west segment between the north/south road and Yonge Street has yet to be established, as well as its exact point of intersection with Yonge Street, and that there may be some measure of flexibility in those matters.

[58] The ultimate point of counsel for the Town, as was declared in his final submission, is that the Board in its decision protect for such a new road allowance. It was not the Town's position that a dedication was being sought at this stage, nor was any authority for such a position put forward.

[59] The position of the Appellant was to reject any provision for such a road allowance. In keeping with the position of the Appellant's planner on the general planning issues, the Appellant took the position that the east/west road had no official or approved status and should not, and could not, be treated with any authority in this hearing as a relevant factor in the Board's consideration.

[60] The Appellant's urban design witness, as noted above, did take cognizance however of the pedestrian and cycling objective of the OP and PDR, and in response, modified the site concept plan to make allowance for a 1.5 metre strip at the southern extremity of the Property (to ultimately match with a 1.5 metre strip from the abutting property to the south) to accommodate a future 3 metre path or trail for use by pedestrians and cyclists. This area could be subject to a form of easement in favour of

the Town to establish a public pathway. This 1.5 metre strip was situated southerly to the property line commencing at the southern edge of the asphalt driveway that would serve as the access drive to the underground garage and internal driveways on the Property as developed. That driveway was shown on the concept site plan with a width of 6.5 metres.

[61] The Appellant's transportation planning witness took issue with the east/west road from a number of bases. Firstly, as did the planners and counsel for the Appellant, he believed that there was no proper policy or legal basis for the road at this stage. He further advised that as there will be a raised median in Yonge Street to accommodate the new rapid transit service, this road could only function on a right-in/right-out basis at Yonge Street (as would be the case with the drive to the Property as proposed on the Appellant's site plan). As such, this road could not be a factor in providing any real capacity relief for the two arterials abutting the Property. In calling for the road, the municipality would be taking up land inefficiently, contrary to Provincial policy, and would be facilitating automobile traffic in an area where the policy goal of all three levels of government was to reduce auto dependence and give priority to pedestrians and transit users. He strongly asserted that such a road would provide no greater access to the Property than already provided as set forth on the concept site plan.

[62] The Appellant's witnesses all took the position that the area was already sufficiently fine-grained from a road and walking perspective and that there were sidewalks along Yonge Street, Carrville Road and Spruce Street that served that purpose.

[63] By way of counterpoint to these arguments of the Appellant's witnesses, the Town Director suggests that the narrowness of the Appellant-offered right-of-way belies the lack of understanding on the part of the Appellant's consultants of the characteristics required for cycling infrastructure and the separation of the cycling function from the pedestrian function within such rights-of-way. He further advises that paths across private property are not always clearly understood by the public as being open to public use and therefore are impaired in providing the connectivity objective sought by the

Town. He acknowledges that the road will not provide full turns at Yonge Street but clarifies that it would, when fully connected to the north/south street, provide alternate, more efficient options for westbound traffic from the Property via the proposed signalized intersection of the north/south street with Carrville Road.

[64] And perhaps most importantly, envisaging the redevelopment of the lands to the west of the Property within the KDA, in order to avoid a multiplicity of access points onto Carrville Road from those lands, the east/west road would allow for the creation of public highway access in lieu of access to Carrville Road for those lands and thereby not only improve the traffic flow on Carrville Road but also contribute to an uninterrupted commercial realm along Carrville Road that was safe for pedestrians.

[65] The Board further observes that in the Background Research document, which was extant from April, 2016, it was a matter of public record that there was contemplation of some form of east/west road. It appears on each of the three scenarios, in the least intense scenario as a new lane/access and in the two more intense scenarios as a new street. The Appellant and its consultants should have been, and appear to have been, cognizant of this initiative.

[66] In the analysis of these positions by the Board, and especially that the final authorization of the east/west road in this location has not yet crystallized, the Board however recognizes that there is a comprehensive planning exercise still in process with legitimate Town building goals which should not be prematurely compromised. To be sure, this must be considered in the light of the time when the Appellant brought forward its application and the policies that it was then subject to, and presumably designed around. As discussed in *James Dick* above, despite potential prejudice to a private interest, the Board has the discretion to consider and apply more recent policies and more modern standards that are consistent with a compelling public interest.

[67] In expressing that analytic approach, the Board in this instance is also influenced by the particular facts of the proposed development. The area sought to be protected by the Town for potential acquisition for public highway purposes is shown

from east to west across the site's width as a paved driveway with the adjoining blank 1.5 metre strip to the south offered for public walk purposes. This area together represents approximately eight metres of width from east to west. As such, a conversion of this 8 metre strip from private to public highway purposes would not deprive the Appellant of the access which was intended from Yonge Street on the clear proposition of law that a landowner is entitled to access to its lands from the abutting public highway. As such, the Board will act on a precautionary principle basis here to protect for a potential public acquisition of this eight metres by requiring in the zoning by-law that this area cannot be encumbered with permanent structures at, above or below grade.

[68] The Board understands that this may have an impact on the construction of the underground portion of the building and the layout and area available for parking spaces in the underground garage. At this juncture, the Board has no firm knowledge as to this impact and how it may be addressed. This may have to be the subject of further submissions to the Board, in conjunction with the other directions regarding the elements of the zoning amendment by-law which will be addressed below. It is not the view of the Board that the Appellant must be relieved of any and all prejudice which comes of this resolution of the Board but, in the interest of fairness, the Board wishes to ensure that the most practical and reasonable result can be provided in light of the Board's determination to balance the private and public interests at play here.

THE DECISION OF THE BOARD

[69] The Board will allow both appeals, in part, and will authorize a mixed use high density redevelopment of the Property. Drafts of an official plan amendment and zoning by-law amendment were tendered as part of the Appellant's evidence in the hearing. The Board had concerns with the form of those drafts, as it expressed during the hearing. The final form of documents will have to conform with the findings and determination of the Board as enunciated below. As such, the Board withholds its Order as to the actual official plan amendment and zoning by-law amendment until it has received from the Parties forms of these instruments which are advanced for

approval on consent and which conform with the directions of the Board as expressed herein.

- a. The Board is authorizing a permitted total gross floor area for the Property of 39,900 square metres. The Board does not find it necessary to prescribe a FSI. With the assignment of permitted floor area and the absence of a FSI, any future acquisition by the Town of land for the east/west road would not diminish the development potential of the Property as determined by the Board.
- b. Height of buildings will be determined by the application of the 45 degree angular plane from the nearest low density neighbourhood limits.
- c. The most southerly 8 metres of the Property shall be maintained free of buildings and structures at, above and below grade. This shall not preclude improvement of any or all of this area for the purpose of a pedestrian and vehicular access driveway.
- d. The Board makes no findings as to setbacks from the other boundary lines and leaves that to the Parties to address as required.
- e. The zoning by-law shall contain a standard which requires a minimum separation between towers of 25 metres.
- f. Tower floor plates shall not exceed 750 square metres.
- g. Parking standards should reflect the current Town standards applicable for a KDA, with minimum and maximum supply standards and provision for car share adjustments consistent with current standards to a maximum of such car share spaces to be specified in the zoning by-law.

- h. Bicycle parking shall be required consistent with standards applicable in the KDA.

[70] It appears that the by-law being amended, Township of Vaughan Zoning By-law No. 2523, has no mixed use zone category. The Appellant's draft zoning amendment by-law proposed to create a new zone called the Key Development Area (KDA) zone. The draft then went on to list a variety of permitted uses and establish development standards for this zone. The draft also contained a variety of defined terms. Since there is apparently no present contemplation of this zone in Zoning By-law No. 2523, the Board wishes to move with care in the creation of these provisions in order to ensure that all necessary matters required for proper administration of the zoning by-law have been addressed in a fashion that is coherent with the parent by-law and according to standards that are reflective of the character of the Key Development Area. As such, the Board directs the Parties to collaborate on the generation of a fresh draft that will meet the regulatory requirements of the Town and incorporate the Board's determinations set forth above.

[71] If there are difficulties in concluding draft documents acceptable to the Parties, the Board can be spoken to and if that is required, the Parties should contact the Case Co-ordinator at the Board to determine the appropriate method to bring the matter to the Board.

[72] The Board hastens to add that it has not made any judgment as to the final determination of need for the east/west road or the width or alignment of any such east/west road in specifying a protection area of eight metres. This width has been determined by the Board on the evidence which was before it in terms of the potential for such a road and the site design advanced by the Appellant. This represents an attempt by the Board to respect the potential direction of evolving policy in the public interest while mitigating impact on a landowner.

“Gerald S. Swinkin”

GERALD S. SWINKIN
MEMBER

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

Ontario Municipal Board

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