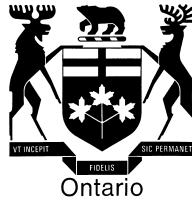


ISSUE DATE:

Nov. 17, 2005

DECISION/ORDER NO:

3032



PL040659

Ontario Municipal Board
Commission des affaires municipales de l'Ontario

Sterling Silver Development Corporation has appealed to the Ontario Municipal Board under subsection 22(7) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended, from Council's refusal or neglect to enact a proposed amendment to the Official Plan for the City of Toronto to redesignate land located South of Bloor Street West running between Dovercourt Road and Rusholme Road to increase the permitted floor space index to permit the development of a rental apartment building

(Approval Authority File No. TC CMB 2002 0017)

OMB File No. O040113

Sterling Silver Development Corporation has appealed to the Ontario Municipal Board under subsection 34(11) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended, from Council's refusal or neglect to enact a proposed amendment to Zoning By-law 438-86 of the City of Toronto to rezone lands respecting 730 Dovercourt Road & 323, 357 Rusholme Road to increase the permitted gross floor area density to 3.5 times the area of the lot and to update the existing performance standards to permit the development of a rental apartment building

OMB File No. Z040082

APPEARANCES:

Parties

Counsel*/Agent

Sterling Silver Development Corporation

K.D. Jaffary*

City of Toronto

S.M. Bradley*

Dufferin Grove Residents Association

S.M. Pin

DECISION DELIVERED BY M.C. DENHEZ AND M.F.V. EGER

Sterling Silver Development Corporation (owner) proposes a highrise rental residential project at 730 Dovercourt Road, in the City of Toronto (City). It needs amendments to the applicable City Official Plan (OP) and Zoning By-law (By-law), to permit the development. City Council refused, and the applicant appealed to the Board. The appeal is challenged by the City, and by the Dufferin Grove Residents Association (DGRA), which was recognized as a party at a Pre-hearing Conference.

From the outset of the hearing, the parties submitted that this dispute focused on two distinct issues:

- "Urban form", including the location and mass of the proposed building; and
- "Community benefits", notably benefits which the City could secure from the owner under s. 37 of the *Planning Act*.

The Board conducted a three-week hearing, including an evening session to hear participants. It has carefully considered all the evidence, as well as the submissions for the parties. It concludes as follows:

- The Board approves development in principle.
- In terms of urban form, the Board prefers the third scenario outlined (in testimony) by the City's urban design expert, Mr. Borooah.
- That scenario was a five-storey podium (stepped back at the third storey), surmounted by a northern "squarish" "bump" (point tower) aligned with 730 Dovercourt.
- The Board finds, however, that the point tower should be limited in height by the 43° angular plane, for shadow purposes.
- The Board approves the addenda, offered by the owner, as "community benefits" to be secured under Section 37 of the *Planning Act*.
- The Board does not support the imposition of other s. 37 "benefits" on the owner, unless there is a nexus between the benefit demanded and the development proposed.

- In this case, the only nexus between s. 37 benefits demanded by the City, and the proposed development, pertains to the demand for park improvements as a *quid pro quo* for loss of landscaped greenspace.

The details and reasons are set forth below.

BACKGROUND

The subject property, called Doversquare, is just south of Bloor Street West between the Ossington and Dufferin subway stations. It is bounded by Dovercourt Road to the east, Hepbourne Street to the south, Rusholme Road to the west, and the backs of commercial properties on Bloor to the north. Aside from Bloor itself, which is characterized by 2-3 storey commercial and mixed-use buildings, the rest of the district is composed of “mature” (early 20th century) lowrise dwellings.

The subject property is a longstanding exception – 2.2 hectares with three mid-1960’s highrise apartment towers (with 849 existing units and 800 parking spaces), plus one small single-family dwelling (309 Rusholme Rd.) at the southwest corner of the site.

Mid-1960’s reports, in evidence, outlined the City’s Modernist urban renewal enthusiasms at the time. Although the reports called the area “stable” and in reasonable condition, it was slated for highrise redevelopment anyway, with “a twenty-one acre district, bounded by Bloor St., Dufferin St., Dovercourt Rd., Hepbourne St., and Dufferin Grove Park... to accommodate about 2400 apartment units”, including the subject property. The City passed a site-specific By-law (number 22620) for highrises there in 1965, and three were built. However, plans to replace the rest of the district did not materialize, and only one other tower was built in the area (on Dufferin Road next to Dufferin Grove Park). Plans to “redevelop” Bloor itself persist to this day, though now downscaled to five storeys. The surrounding residential streets are still considered “stable”, and current planning documents reflect an intent that they stay that way.

The 1960’s reports outline a debate over what one lawyer called “Squish & Spread”: should the towers be lower and fatter, or taller and thinner? Successive planners (and iterations) traded height for girth and back again. The final decision

favoured height, in return for a smaller footprint and more landscaped grounds (70% of the site devoted to greenspace, and 14% lot coverage). There had been a strong interest in greenspace and in residents' perception of same; in contrast, the documents barely mention the final height *per se*, possibly because the perception of those extra storeys, so far up, is limited from street level. Indeed, pedestrian-level photos on exhibit illustrated the difficulty of discerning the difference between the 15 storeys at one tower, and the 19 storeys at the other two. The plans labelled the three towers, eventually built on the site, as follows:

“A”: 730 Dovercourt Road (19 storeys);

“B”: 323 Rusholme Road, along Hepbourne Street (19 storeys); and

“C”: 357 Rusholme Road (15 storeys).

Another debate in the 1960's was over density, with projections at between 2.0 (i.e., twice as much floor coverage as ground area) and 3.0 (triple coverage). Ultimately, under a bonus formula tied to the generous greenspace, the three-tower complex was built in the mid-1960's to a density of 2.4 – in contrast to the density of 2.0, which the City's in-force Official Plan sets for other highrises outside the Core Area, and in contrast to the surrounding lands whose allowable density is 0.6.

The doctrines of the day favoured what witnesses called “tower-in-the-park” development. In Toronto, most projects foresaw a highrise in the centre of a “park”; but Modernist theory also allowed complexes in a “pinwheel” pattern, with buildings “staggered” along the periphery, around a windswept plaza. That was apparently the inspiration here. In the middle of the subject property is an open grassed “commons”. It is crossed by pathways, and although it is private property, these paths are reputedly popular with the general public, in a district which was labelled “parks-deficient”.

The commons is modestly larger than a football field:

- It is flanked on three sides (east, south and west) by the towers;

- the fourth (north) side looks out on surface parking (largely occupied by Canada Post trucks), the fenced garbage collection area, and the rear of the commercial buildings on Bloor (a “rather grim” view, in the words of the owner’s architect – what counsel for the owner called “ratty old loading doors and fire escapes”).

A defining characteristic of the complex’s configuration is that it retains an element of openness; according to 1960’s documents and uncontradicted evidence, this was intentional. Although the towers obviously impede each other’s views, they do not do so to the point of total enclosure – leaving what one City expert called “visual relief”.

This rental residential complex was controlled by three families. Over time, facilities declined: the consortium mothballed the indoor pool, sauna and games room, plus an entire garage level for lack of demand; and off one or two lobbies, “living room space” was closed off and turned into units.

In the 1990’s, however, the three families partitioned their entire real estate portfolio. Doversquare fell to the Silver family, whose company was named Sterling Silver Development Corp. The company’s representative, Mr. Sadowski, testified to \$8 million in improvements to the property; and Mr. Walty, speaking for the tenants’ association, did include some complimentary comments in that regard.

However, Mr. Silver senior died, and the controlling interest in the family company passed to executors, with trusts for various heirs/beneficiaries for years to come. Mr. Sadowski testified to their interest in further development of the property – but not for condominium: selling off part of the assets (i.e., condos in new or existing buildings) would deplete the heirs’ real estate portfolio, which the executors are reluctant to embark upon. That fiduciary perspective, according to Mr. Sadowski, explained why the executors and the company intended to keep the existing property rental, and why any future development would also be rental, and not condo.

About 44% of the existing units meet Canada Mortgage and Housing Corporation's definition of "Affordable" (i.e., rents at the Toronto average or less), and the rest as "Mid-range" (rents between 1.0 and 1.5 times the Toronto average).

THE PROPOSAL

The proposed construction site is along the north side of the property, where Canada Post trucks park in front of the "grim" view toward Bloor. It would also cover some greenspace, along the existing path which crosses the property diagonally. The owner's initial intention was to build a 19-storey (57 metre) "point tower" there (about the same height as buildings A and B).

- A *point* tower is a high building with a relatively small floorplate (perhaps 700-1050 square metres), with apartments around a central core.
- It is in contrast to a "slab", built on the length, where apartments face a corridor. Slabs tend to occupy more space and cast more shadow.
- Parenthetically, point towers are frequently placed atop a broader lowrise architectural pedestal called a "podium". The owner's initial proposal included a three-storey podium.

Mr. Sadowski testified that he prefers point towers over slabs to this day. However, City staff seemed to prefer a lower slab, so that is what his architect produced -- in three subsequent iterations, including the one presented to the Board. It is for a 280-unit L-shaped rental apartment block, "scaling down" in height from 15 to 3 storeys as it extends from the centre of the block eastward to Dovercourt.

Immediately across Dovercourt from the proposed construction site is a series of older buildings which appear commercial, but which are thought to contain some residents; there is also a funeral parlour. Dwellings are found further down the street, across from building "A", and separated from the funeral parlour by a vacant church. On the same block as the complex, at the southwest corner, is a church, and a former institutional building (adaptively converted to condo) called Hepbourne Hall.

At the hearing, the owner focused on positive features of the proposal:

- The new building would supply over twice as many purpose-built rental units as are added to the market in the entire City in a year.
- Rents would be in the "mid-range" category.
- Even if mid-range rents are not remarkably low (and not in the "Affordable" category), the increase in rental supply *ipso facto*
 - i) Increases the range of options available to consumers, and
 - ii) By increasing supply relative to demand, takes some market pressure off rentals generally, with presumed positive effects on pricing.
- The development would block the "grim" view toward Bloor.

The owner also offered various addenda, intended to appeal to the existing tenants and to the City (with some clarifications at the hearing itself):

- a) Improving elevators in the existing buildings;
- b) Centralizing garbage storage, thereby removing unsightly storage from buildings A, B and C;
- c) Improving the appearance of the garage entrance off Dovercourt;
- d) Improving the Rusholme/Hepbourne corner area, including the premises and grounds of the house at 309 Rusholme Rd., on approval (or voluntary relocation) of that tenant;
- e) Landscape improvements, including enclosure of the emergency stairwells from the garage (which currently protrude into the commons and are perceived by tenants as a security problem);

- f) Improving lobbies of the existing buildings;
- g) Using advanced approaches toward energy and “green” technologies;
- h) Returning some 450 square metres of mothballed pool and sauna space, in building B, back into service as tenant amenity space (whether as a pool or otherwise, depending on tenants' wishes); a related option was to open the pool to the general public for a “nominal” fee;
- i) Rent the new building at “mid-range” rents, and not to apply for condo conversion (or demolition) until at least 2013 (the owner’s initial offer was shorter, i.e. for 5 years);
- j) Maintain the existing buildings at “mid-range” rents, and not apply for condo conversion (or demolition) until at least 2013 (the initial offer was shorter, i.e. for 5 years);
- k) Providing patio/barbecue space for each of the existing buildings; and
- l) Installing a “tot lot” north of building C for the tenants.

The owner evaluated those addenda at between \$960,000 and \$1,500,000 (depending on how to count elevator work). However, the City and DGRA were critical:

- While acknowledging the appropriateness of some development, both said this proposed building was too big;
- Both criticized the loss of sky views and the “sense of openness”;
- Both objected to the proposed separation distances, between the new building and buildings A and C, as too constricted, with impacts on the existing buildings and on the walkway across the commons;
- Both expressed concerns about shadowing;

- Although the City and DGRA did not object to wind and traffic aspects, some participants did.
- The outdoor amenity space for the new building would be in perpetual shadow, and flanked by parking, the centralized garbage facility, and the "grim" view toward Bloor.

They also downplayed the significance of the addenda:

(a)-(g), (k): Neither commented significantly on (a) through (g), or on (k);

h) On the pool/sauna area,

- the tenants wanted assurances that there would be no risk to security.
- The City, for its part, did not consider the offer to restore the pool particularly meaningful, given other pools in the district.
- As to whether this could be considered indoor "amenity" space, the City preferred amenity space *per se* distributed among the existing buildings, with a significant component accessible to the public at large. The City went into detail, referring to tables, chairs, trays, cups, plates, cutlery etc.

i) The City took no position on the *new* building being rental instead of condo, nor did it consider this very meaningful.

j) The City, however, wanted the *existing* buildings to be secured as rental for a minimum of 20 years, not just 5 or 8.

- l) Neither the City nor DGRA liked the tot lot location (both preferred the opposite side of building C, abutting the commons); and both preferred that it be available to the public at large. The City also wanted the owner to spend about half again as much, on more equipment.

The City also wanted addenda that were entirely different from what the owner offered, namely:

- that the owner deed easements (legal rights of way) to the City, over the pathways across the property;
- that the owner improve park facilities in the neighbourhood; and
- that the owner provide amenity/meeting space (in the complex or off-site) for the public at large.

THE PLANNING CONTEXT

The embryonic proposal was broached with the then City Councillor in February 2001; discussions with City staff began in earnest in October 2002. At the time, there were two relevant Official Plans (OPs), both dating from 1994:

- the Metropolitan Toronto Official Plan (“Metro Plan”),
- and the then City of Toronto Official Plan (“in-force OP”).
- A newer OP (“new OP”) was adopted by Council in November 2002, but is not yet enacted; so the two 1994 documents apply. The new OP, however, is instructive to the extent that it reflects planning thinking.

The general scheme of the in-force OP foresees the highest densities in the Central Area, east of Bathurst Street, with a maximum density of 3.0. Elsewhere, the maximum density is generally 2.0. At the time that the three towers were built, local

density was also limited to 2.0; but as mentioned, a bonus for the substantial greenspace resulted in a density of 2.4.

Today, if the new fourth building were constructed as proposed,

- total density for the subject property would reach 3.4,
- i.e., higher than either the Central Area limit of 3.0, or the non-central apartment limit of 2.0. Hence the application for an Official Plan Amendment (OPA).
- A City expert testified that if the new building were built on its own, it would have a density of 4.0. That figure was not disputed.

As to zoning, the subject property is covered by site-specific By-law 22620 defining the dimensions of the existing towers. The general By-law for the area, No. 438-86, specifies a maximum height of 10 metres and density of 0.6.

ANALYSIS

The site is near two subway stations. Its appropriateness for some development, at that corner of the property, was not disputed by either the City or by DGRA. The questions pertained to the kind of development, and its conditions.

The owner's project is an intensification of land use, for purpose-built rental, i.e. a housing option which has been in short supply. The relevant Provincial Policy Statement (1997) overtly favours both intensification and the expansion of housing options:

- 1.2.1 Provision will be made in all planning jurisdictions for a full range of housing types and densities... by:
 - d) encouraging all forms of residential intensification in parts of the built-up areas that have sufficient existing or planned infrastructure to create a potential supply of new housing units available for residential intensification....

The 1994 Metro Plan similarly includes the following objective:

125. To encourage investment in new private rental housing and the preservation and maintenance of existing rental housing and to support provincial and federal policies in this regard....

It was not disputed that the construction of new rentals, in the City as a whole, is significantly below City and Metro targets. The Board is aware that in the apparent view of some City staff, new purpose-built rentals are largely meaningless unless further “secured” under a twenty-year agreement; the Board finds nothing in the relevant documents to support that view. In keeping with what counsel for the City said about the onus of proof, the Board is satisfied that this project would be appropriate, were it not for the objections pertaining to “form” and “community benefits”. These were two independent arguments, each of which was reputedly fatal to the proposal: even if the community benefits had been profuse, the building was still too big; and even if the scale were acceptable, the proposed benefits were allegedly inadequate. These arguments will be examined in turn.

But first, one must discard notions on which this decision is *not* based. The Board heard that when an OP specifies a given maximum density or height for an area, this does not actually mean a limit: rather, its intent is primarily a procedural threshold or “trigger”, to signal the point at which negotiations (between owner and City) and public processes begin. It was further inferred that those negotiations proceed with few signposts – a bargaining session for whatever either party can get away with (e.g., conditions for “trays, cups, plates and cutlery” in amenity spaces). One suggested criterion, however, was that intensification be subject to “the zoning performance standards” whereby one part of the property could not be developed until other *existing* buildings, on the same property, met today’s zoning requirements – even if built decades before those requirements were enacted.

To all those, the Board says: no. The *Planning Act* is not a bazaar. Statements in an “Official Plan” are supposed to articulate a vision for the municipality, not just to be “triggers” for the opening of negotiations. And those discussions do not proceed in a vacuum: urban form should depend on planning principles, not on who can haggle the longest and best. Finally, although specific laws sometimes demand that pre-existing

buildings be brought up to today's requirements for life and safety, this does not extend to non-safety issues in zoning.

Above all, processes must be methodical and foreseeable: for the very definition of the verb "to plan" (*Shorter Oxford English Dictionary*) is "to arrange beforehand".

Urban Form

The Board heard much about how this site was "anomalous". That is not disputed. Nor is the acceptability of some new construction, or the principle that it should "integrate" and "harmonize" with its surroundings. What was disputed was whether this *meant*

- A highrise slab like the other buildings on site,
- A lowrise building like those in the neighbourhood, or
- A "transition" somewhere in between, or combining elements of the two.

The proposal before the Board was nobody's first choice.

- The owner advanced four scenarios – but Mr. Sadowski said the first choice had been (and remained) a point tower with podium.
- The City staffer (urban designer) on the file (Ms Old) suggested a mid-rise slab, near the location of the owner's proposal.
- The City's main urban design witness, Mr. Borooah, displayed two low and mid-rise design scenarios;
- In testimony, he described a third scenario with a substantial five-storey component, and a northerly "bump" (apparently a point tower) at a height "to be determined" (*perhaps* "eight storeys" from street level).

At one stage, the owner's counsel interjected wistfully: "Our point tower is looking better all the time". The spokesman for residents of neighbouring Hepbourne Hall also offered some positive words about point towers.

According to City testimony, the City planner who first dismissed the point tower had not seen the property, and is no longer with the City. There followed a three-year period in which communications were, at best, uneven and uncertain (complete with meetings interrupted by fire alarms). Testimony named eight City planners on the file. The agent for DGRA opined that had exchanges of information been better generally, the ensuing dispute might have been avoidable – conjecture which, although perhaps optimistic, appeared to resonate with all concerned.

Finally Mr. Borooah, the last City expert, reviewed the matter afresh; and one scenario he could recommend was... a point tower with podium, taking matters full circle.

When analysing scenarios more closely, the current proposal has two main parts: a five-storey north-south segment along Dovercourt (dropping down to a three-storey façade), and a highrise east-west segment protruding into the centre of the block (which the City repeatedly called "the slab"). The highrise slab also projects south of the five-storey segment into the intervening space, by a distance of 3.5 metres: the five-storey segment would be at 20.5 metres from Building A (730 Dovercourt), whereas the slab would be at 17 metres, which the City claimed was too close.

Most of the dispute pertains to the highrise slab; the Board heard no significant criticism of the five-storey segment. Indeed, two City witnesses spoke highly of it, with the caveat that Mr. Borooah preferred a greater step-back between the three-storey and five-storey components. The City also preferred the Dovercourt façade to extend north to the property line, to include the garage entrance. The Board finds the merits of the 3-and-5 storey component essentially undisputed, and is prepared to approve zoning accordingly. Like the City, the Board sees merit in including the garage entrance in the facade, and would allow same, at the owner's option.

The 13-15 storey segment is more contentious, being allegedly (i) too high, and (ii) too close to the other towers. Although it blocks the "grim" view toward Bloor, the density of the new building would be twice the limit set by the in-force OP; by that criterion alone, the size of the project would be problematic.

But matters do not end there. Until recently, density was crucial in determining whether a building was too big. Density is prominent in the in-force OP, but the new OP abandons that approach, in favour of other factors including bulk, shadow, sky views etc. However, the Board finds size equally problematic according to other criteria.

Some features are more benign than others. For example, there were concerns about shadowing, which the Board considered overstated. Unlike some other municipalities, Toronto does not define acceptable shadowing technically; but here, the proposed structure (rising in steps from 3 to 15 stories) complies with an angular plane of 43°, leaving the east sidewalk of Dovercourt in sunlight for six continuous hours at the equinox. The owner's expert testified that this was an appropriate standard, and the Board heard nothing from the City's or DGRA's experts to suggest a more appropriate standard. The City's planner, Ms Hug, labelled the project's standard "sufficient". As such, the Board finds nothing unacceptable in the proposal's treatment of shadow.

Some participants also raised the question of parking. In that respect, the project more than complies with City standards. The owner's traffic expert testified that traffic and parking will be acceptable; that testimony was not seriously disputed by other experts, and the Board is satisfied.

On wind, the owner's expert testified that impacts would be acceptable. Ms Hug, the City's planner, said changes to wind would not produce "significant average impact". This was challenged by DGRA's planner; but as articulate as he was, the Board was not persuaded that he had discredited the specialized expert studies.

Neighbours also expressed concern over the temporary noise and disturbance which would accompany the construction of any project. These are not, however, factors which the Board may normally consider in evaluating urban form.

Bicycle parking was another issue. There was apparent consensus on a figure of 200 spaces, but disagreement on location, particularly on whether it would be at grade. However, no By-law insists that bicycle parking be at grade.

There are, however, objections that are far more serious.

The Board agrees with the characterization of the project, by the City's urban design expert, that this is "adding a highrise slab in the middle of the block". It replaces the openness of the property with enclosure, contradicting a defining characteristic and *raison d'être* of the property. Although evolution is natural, the visual evidence, such as Exhibits 53-3 and 53-4 depicting Mr. Borooah's graphic computer simulations of the proposal, illustrate a change in that character which can only be called radical.

The project also fails to protect sky views. "Views" are not normally subject to protection, as counsel mentioned parenthetically. However, "sky views" are different from normal views. "Picturesqueness" has nothing to do with their importance, which is not aesthetic but psychological: it is to avoid the sense of being boxed in. The owner's urban designer disputed that notion, arguing that the project's mathematical relationship of horizontal and vertical planes met prescribed ratios for street facades. The 15-storey slab, he added, "won't have a perceptual change on the view of the sky.... (In any event) if sky were good, we'd all live in the countryside".

The Board is unconvinced. As much as the Board favours purpose-built rentals and intensification (for reasons described earlier), the visual evidence is compelling. Indeed, even if the above individual objections were not fatal to the size of the slab, the Board finds that the cumulative impact is. The project, as presented, represents over-intensification in terms of its form, and the Board has not been persuaded otherwise.

But the testimony of the City's urban design expert did not stop there. He outlined three counter-proposals which, in his expert opinion, would retain the advantages of the owner's proposal while avoiding pitfalls. The Board will focus on them – notably the third scenario – not only for the above reason, but also because it bears uncanny resemblances to what the owner originally intended, and also to a scenario mentioned by the spokesman for neighbours at Hepbourne Hall.

That scenario is for a point tower with podium. Mr. Borooah's testimony described a shorter and more slender tower, but with a longer and taller podium than the owner may have anticipated.

Instead of a three-storey podium, Mr. Borooah described a five-storey building. Compared to the original podium, Mr. Borooah's structure would also extend further along the back of the property (thus hiding more of the "grim" views without removing large sky views), on condition that this podium be "narrower". Mr. Borooah's scenario included a five-metre step-back at the third story, not only along the Dovercourt façade, but all around the building. For example, if the owner's architect depicted the footprint of the south façade of the five-storey segment at 20.5 metres north of Building A (a segment which Mr. Borooah approved of), then Mr. Borooah's step-back would result in the top parapet (of the south façade of that segment) being 25.5 metres north of Building A. On the south, west and north sides, this five-metre step-back could occur either entirely at the third storey level, or could be done in two steps, at the third storey and the fourth storey, like a wedding cake.

The Board finds no objection to this step-back arrangement (either as a single large set-back on the third floor, or as two smaller set-backs on each of the third and fourth floors) for the south and west sides of the podium. The Board, however, will not insist on a change to the step-back which the owner's architect has already designed on the east side facing Dovercourt, since the architect's treatment of that 3-5 storey component has already elicited approval from the City planners and Mr. Borooah himself. As for the north side, Mr. Borooah had suggested the step-back in anticipation of eventual residential uses in supposed five-storey "redevelopment" along Bloor. For reasons further outlined below, the Board discounts that factor, and hence the step-back along that side would not be obligatory.

Mr. Borooah would move the tower "as far north as possible", as per the original concept of development close to the periphery of the property. He did not attach a numeric figure for recommended distance. One might infer a step-back, between the five-storey segment and the tower, that was at least as great as Mr. Borooah's proposed step-back between the three-storey and five-storey segments, i.e. at least five

metres. By that inference, if the south-facing parapet of the five-storey segment were 25.5 metres north of Building A (as estimated above), then the tower would be at least 30.5 metres north of Building A.

Most importantly, the tower would be "in the shadow" of building A, which Mr. Borooah explained to mean in approximate north-south alignment with it, with a "smallish, squarish" floorplate. Coincidentally, assuming that the Dovercourt façade of the tower remains at the same setback from the street, the result is that the tower would have approximately the same depth as the current proposal's width along the Dovercourt facade – i.e., "squarish".

This northward movement elicited an objection from counsel for the owner and its urban designer, on the ground that it might "deter redevelopment" along Bloor. The Board does not treat that concern as decisive. Although "intensification" of the Bloor corridor is an OP objective, "redevelopment" is but one form that it can take (other forms include rehabilitation, additions, adaptive re-use or infill). Nor did any witness suggest that redevelopment was likely soon, particularly given current height limitations; so compared to other intensification options for this vibrant area, the assumption that this stretch of Bloor would "redevelop" appears more like a carry-over of the 1960's vision. The Board finds no *a priori* objection to Mr. Borooah's alignment.

Mr. Borooah would not be pinned down on the tower's height, aside from saying "less than 15 storeys". He suggested the figure of eight storeys in an offhand way, but insisted that the final determination "be worked out". The Board notes, however, that on the critical subject of shadows, extensive study has already been "worked out", producing the angular plane illustrated at Exhibit 9(b). On the basis of the detailed expert testimony on that subject, the Board is satisfied that this angular plane is an appropriate criterion to govern the height of the tower.

In short, on the subject of urban form, the Board is persuaded of the merits of Mr. Borooah's third scenario. It has many of the attributes that the owner referred to, while avoiding the pitfalls. To recap what the Board will approve:

- On its east, west and south facades, the podium would have three storeys akin to the neighbourhood,
- then step back to five,
- with a northern point tower in the “shadow” of Building A, subject to the angular plane, giving it a probable height of 15 storeys, i.e., four storeys shorter than buildings A and B, but akin to building C.

In terms of compatibility, the Board finds that this result combines elements of the existing towers, the neighbourhood, and transitional elements between the two. Further specifics for the expected development will be outlined at the end of this Decision.

Community Benefits and Section 37

Under the status quo, a development triggers two distinct layers of obligation:

- i) To pay Development Charges (DCs), intended to offset the extra pressures generated by the development on municipal services, and
- ii) To dedicate parkland (or provide cash in lieu), under s. 42(1) of the *Planning Act*.

The owner estimated that its proposal would cost (i) \$1.2 million in DCs, plus (ii) “perhaps \$350,000” for parks. The general scheme of the provincial legislation is for *these* measures to cover the cost of extra population pressures: as stated in the *Development Charges Act* at s. 2(1), development charges are intended “to pay for increased capital costs required because of increased needs for services arising from development of the area to which the by-law applies”.

The *Planning Act*, at s. 37, also addresses situations where developers volunteer other benefits: the section allows such undertakings to be committed to writing and enforced. As mentioned, the owner also volunteered addenda which it evaluated at a further \$960,000-\$1,500,000.

But can the City *demand* more, i.e. a third layer of obligation, beyond (i) DCs and (ii) parkland dedications? Here, the City did make such a demand, including securing the rental status of the existing buildings for longer than the owner offered, plus other “community benefits” (for improvements, non-profit community facilities and more park money etc.) which the owner evaluated at a further \$1.2 million. The owner and the City differ on what the City can impose as a *quid pro quo* for an Official Plan Amendment (OPA) and upzoning. The *Planning Act* states as follows:

- 37.(1) The council of a local municipality may, in a by-law passed under section 34, authorize increases in the height and density of development otherwise permitted by the by-law that will be permitted in return for the provision of such facilities, services or matters as are set out in the by-law.
- (2) A by-law shall not contain the provisions mentioned in subsection (1) unless there is an official plan in effect in the local municipality that contains provisions relating to the authorization of increases in height and density of development.
- (3) Where an owner of land elects to provide facilities, services or matters in return for an increase in the height or density of development, the municipality may require the owner to enter into one or more agreements with the municipality dealing with the facilities, services or matters....

The in-force OP, for its part, simply says that the City can pursue s. 37 benefits to secure the positive features of the development proposal.

Previous cases, presented at the hearing, outline the long history of this subject in Toronto, e.g. as chronicled in *Toronto (City) v. Minto BYG*, [2000] O.M.B.D. No. 1102. The Board's attention was also drawn to a newsletter entitled “Height and Density Bonusing” (*Municipal & Planning Law*, Aird & Berlis, Spring 2005), by John Mascarin. There is consensus on several propositions:

- There must be an enabling OP.

- The municipality retains discretion, if it elects, to waive such obligations altogether, even where it has introduced OP provisions foreseeing use of s. 37.

- S. 37 can clearly be used when there is agreement between the parties. Indeed, where the developer agrees, then, as outlined in the newsletter, the benefits can not only be off-site (or in cash), but also: "There are numerous situations where there is no rational connection between the bonus of additional height and density and the provision of certain public amenities". The developer may have its own reasons for wanting to provide same.

- If the developer is silent, municipalities can indeed demand a third layer of obligations to provide "community benefits".

But what if the municipality refuses to waive s. 37, and the developer refuses to volunteer the "community benefits"? In the absence of agreement on s. 37 benefits in return for an OPA or upzoning, can the City impose a requirement for s. 37 benefits of its own choosing, without which the development can be refused? If so, then on appeal to the Board, can the City call upon the Board to give effect to the City's demand, and impose the City's s. 37 benefits as a precondition of development?

The *Planning Act* specifies no clear answer. The in-force OP, as mentioned, says the City can pursue s. 37 benefits "to secure the positive features of the development proposal". The newsletter posits two opposing viewpoints:

- A. The first is that the application for intensified use, *ipso facto*, entitles municipalities to demand a *quid pro quo* because of (i) the increase in population, and (ii) the windfall to the developer. Like any party to a contract, the municipality is at liberty to demand that *quid pro quo* in whatever form or amount it chooses, and dispose of it at its discretion; and like any party to a contract, it can decline to sign off, if not satisfied.

- B. The opposing view is that the municipality's discretion, in demanding s. 37 benefits, is more constrained: there must be a clear nexus between the needs prompted by the development, and the benefits demanded.

In support of proposition (A), the newsletter cites the 2003 Board Decision in *1430 Yonge Street Inc v. Toronto (City)*, (2003), 46 M.P.L.R. (3d) 189. In support of proposition (B), the newsletter cites the Board Decisions in *Minto* (above) and in *Irber Holdings Ltd. v. Toronto (City)* [2005] O.M.B.D. No. 0003. The article concludes that the question remains "contentious".

The Board suspects less "contention" than suggested. In the *1430 Yonge* case, the City sought s. 37 "community benefits" including (i) a new building entrance, (ii) park improvements, and (iii) a "dog fountain". The developer agreed to (i), but not to (ii) or (iii), being too far away. Could the latter requirements be imposed?

The Board said yes – but did not state that municipalities have *carte blanche* to define and compel the s. 37 benefits which are demanded in return for an OPA or upzoning. What the 2003 Decision did was first outline the City's contention:

The City says (that a s. 37 benefit package) does not have to be related or justified by the project, but need simply be a benefit to the public offered in exchange for the permission to develop at a height and density above what the Plan and the by-law permitted.... It is the legal extension of an informal and age-old practice of securing some public benefit in return for a permission that creates betterment or increased land value. Seen in this light, the benefit need not be related to the project or caused by it.

Although some readers might like to believe that the Board Member agreed with that contention, the Decision specified the following as the crux of the issue:

What is relevant is that in return for additional development rights granted to the developer, the exercise of which may have social costs to the public in the area, the public receives some tangible benefit or amenity to offset the cost. If the area residents must put up with increased height, massing and congestion caused by the developer getting additional development rights, the public should receive some tangible benefit. That's the theory behind a s. 37 bonus.... The question in cases such as this is: how much can the Board reasonably compel the developer to pay in the absence of an agreed amount?

So the 1430 Yonge Decision asks: what is “reasonable” compensation for the “social costs to the public... caused by the developer”? It does *not* suggest that compensation is either (i) at the whim of Council, or (ii) that it can be demanded in the absence of incremental “social costs *caused* by the developer”.

The Decision went on to find the park allocation and dog fountain “reasonable”, without explaining exactly how. The Board had used far more specific wording, in the earlier *Minto* case. The City’s position there had been identical:

The City contends that bonusing arrangements have been in place for many years and the public benefits must be a requirement of Minto's approval given it seeks increases in height and density.... It is the position of the City that... it is a condition that any approval must include a requirement that Minto provide a package of public benefits by way of an agreement pursuant to s. 37.

After references to the City practice of demanding contributions (a fixed percentage of the property’s capital gain, pursuant to the upzoning), and its use of the proceeds for social housing, non-profit community facilities etc., the Board in *Minto* responded:

The municipality may choose to incorporate the framework for requiring contributions when, where, or how much and for what purposes in its Official Plan. Only where such a framework is provided in the Official Plan policies, can Council require a contribution....

As in the case of social housing, the Board finds that the necessity for non-profit community, cultural or institutional facilities must be identified within the context of "the development proposal". The City has not demonstrated what facilities of this nature might be necessary "to secure the positive features" of the application.... Whether or not contributions should be authorized must be judged on the beneficial effects of such contributions to the development proposal and it lies with the municipality to demonstrate the connection between the proposal and the benefits.

This need “to demonstrate the connection between the proposal and the benefits” could not only be predicated on the wording of the In-force OP; but it could also be based on fundamental planning principles, notably disapproval of

...uncertainty as to where, when and how any increases in height and density of development might occur. Height and density are issues that should not be

left to *ad hoc* planning....

The contributions requested must be within the clear limits of established policy.... The Board finds from the wording of the Official Plan, supported by a fair expectation that it lies within the authority of Council to clarify what such contributions might be, that they be identified somewhere in the Plan so that the appropriate requirements of the development proposal can be ascertained.... When seeking increases in height or density any applicant should be able to ascertain with some certainty what it will be required to provide in terms of a package of public benefits pursuant to S. 37....

Given... the objective of the legislation to require a municipality to spell out the exercise of that authority for clear, equal and consistent application without arbitrariness, including where and when contributions are required, the Board finds that the latitude exercised by staff to require contributions beyond what is obvious from policy is not supportable.

The City then sought to appeal this Decision, but was blocked by judgment of the Ontario Superior Court of Justice, [2001] O.J. No. 455. Specifically, the City had argued that the Board's Decision appeared to negate its right to impose *any* s. 37 requirements, unless it changed its Official Plan; but the Court replied that this was not so:

The Board did not rule that the City could not utilize the provisions of s. 37..., unless the City had clear pre-existing Official Plan policies in force and effect. Rather, the Board considered the applicable Official Plan and determined that the need to require s. 37 contributions had not been established for this particular site....

In determining (the) policy framework under which an application should be examined, it must be tested against the policy document in place at the date of the application, to lend some certainty to the land use planning process and to ensure that fairness to all parties prevails.... (The Board) found that the City had not provided identification or support for other matters which could validly be included for contribution.... The Board correctly applied the specific provisions relevant to the Minto application. In my view, the Board's decision does not impinge on the City's ability to obtain s. 37 benefits for other development proposals seeking additional height and density, in appropriate circumstances.

So the City had to show "appropriate circumstances" indicating a "need", and leading to "identification or support" of the matters which "could validly be included" under s. 37.

If there was any question about a possible contradiction arising from *1430 Yonge* and *Minto*, then the answer came in the 2005 *Irber* case, which the newsletter

characterized as having “expressly rejected the reasoning in *1430 Yonge Street Inc*, preferring to rely on *Toronto (City) v. Minto*”, quoting the following summary proposition:

There must be a real and demonstrable connection between the s. 37 benefit being requested and the "positive features of the development proposal", as stated in the Official Plan policy.

The Board sees no reason to depart from that reasoning, because for good measure, it is consistent with fundamentals. Although it is trite to observe that for decades, municipalities have been desperate for revenues, the *Planning Act* is not a revenue statute. For its part, s. 37 is neither a municipal capital gains tax, nor a tool for municipalities to sell upzonings to supplement their coffers. As a component of the *Planning Act*, its use must be governed by the principles of planning and the objectives of the Act. In short, there must be a nexus between the development and the s. 37 benefits, demonstrating that the benefits pertain to the development (whether on-site or off), not to unrelated municipal projects (no matter how meritorious).

In that light, and following *Minto* and *Irber*, the Board finds that it was incumbent on the City to “demonstrate (the) connection between the s. 37 benefit being requested and the positive features of the development proposal”.

Some prospective components of a s. 37 agreement are relatively uncontroversial, starting with the commitments that were volunteered by the owner in this case. The Board sees no difficulty in entrenching them as s. 37 undertakings. This includes the undertaking to secure the new building as rental until 2013, whether the City attaches significance to that commitment or not; from the standpoint of Provincial Policy and the Metro Plan, new purpose-built mid-range rental is an asset.

The question is whether, beyond the owner's voluntary undertakings, further s. 37 obligations should be imposed. The answer is yes – if there is "a real and demonstrable connection". For example, the Board would consider increasing the owner's obligations toward securing rental, if there were features of the existing rental that were negatively affected by the proposal. If so, some form of rental *quid pro quo* might have been in order, but there was no such evidence to "support" such a compensating measure. The Board discerns no "appropriate circumstances" in which to

impose obligations beyond what the owner volunteered, namely that the new and existing buildings be secured until 2013. Beyond 2013, the Board notes that the existing legal framework offers other measures to protect tenants in rental buildings, and for City Council to oppose condo conversions at some indeterminate future date.

The Board approaches the question of non-profit community facilities, pathway easements, and other amenities for the general public, in the same perspective. If the development had a significant impact on existing facilities and amenities, compensating measures could be considered; but in this case, it was agreed that the new building would fully meet the amenity needs of its own prospective occupants. As worthwhile as new community facilities would be – and the Board was persuaded by DGRA that they would, these are properly the responsibility of the City, not of the owner under s. 37. The Board is satisfied that the owner's existing undertakings, pertaining to amenity space in the new building and to the reuse of the pool/sauna area, are satisfactory.

As to the tot lot, the Board similarly finds nothing in the development which would "cause" the City to want to increase its requirements beyond what the owner offered. Its exact location will be a site plan matter.

The greenspace, however, is different: on that subject, there is a direct nexus, in two respects. The project will indeed remove landscaped open space from the northeast corner of the property; this has (i) a direct impact on the neighbourhood, which is park-deficient and which, in the view of all parties, relies on Doversquare in that regard; (ii) it also affects the *raison d'être* of the existing complex, insofar as the promise of 70% open space was pivotal in its original approval.

Counsel for the owner argued that the owner would already be required to pay for park space twice – once via DCs (a percentage of DCs goes to parks), and once via the parkland dedication (or cash in lieu). However, that does not resolve the issue: the owner would have been required to make those payments for *any* development, i.e. without even encroaching on the neighbourhood's rare greenspace. As it is, that encroachment justifies the City's call for a *quid pro quo* under s. 37.

On the other hand, according to the City's park expert, "there is no formula" to help quantify a s. 37 park commitment under such circumstances. The Board is also mindful of the admonition, in the *Rental Action Plan* which City Council endorsed (July 2001), to

- allow more housing, including more rental housing; (and)
- reduce or waive fees, charges and requirements for new rental housing;

In addition, the City's park expert said that the new building's 280 extra households did not represent significant incremental pressure on the local park system. Meanwhile, the owner has made commitments to new landscaping and a tot lot. In light of all those various limiting factors, the Board would consider \$40,000.00 to be a reasonable further contribution, under s. 37, to the local park system. The Board expects such contribution to be wholly targeted to improvements to the closest park, namely Dufferin Grove Park.

CONCLUSION

To recap, the Board approves development in principle: the Board finds that a development, subject to the conditions set forth in this Decision, would constitute good planning. The Board has found that Provincial and OP Policy all attach profound importance to residential intensification and rental construction. The Board allows the appeal in part: an Official Plan Amendment and re-zoning by-law, in conformity with the present decision, are approved in principle. The Board will, however, withhold its Order pending completion and receipt by the Board, on or before June 1st, 2006, of the following:

The Official Plan and Zoning By-law being rewritten to conform to the following terms:

1. Development is approved according to the footprint described at Attachment 1.

2. The east side facing Dovercourt shall comply essentially with the dimensions, setbacks and step-backs set forth in the architect's conception presented as Exhibit 9(c), subject to the following changes:
 - a) The owner may, at its option, extend the podium northward toward the property line, to incorporate the garage entrance.
 - b) The tower component shall be shifted northward: it shall be at least 30.5 metres from Building A.
3. The height of the tower, inclusive of mechanical penthouse and stairwell, shall be limited by the angular plane of 43° described at Exhibit 9(b).
4. The tower shall be essentially square, to retain openness and sky views in the commons.
5. The podium may be built to a maximum of five storeys.
6. There shall be a step-back on the south and west sides of the podium. This five-metre step-back could either occur entirely at the third storey level, or could be split (essentially half at the third storey and rest at the fourth storey), at the owner's option.
7. There shall be vehicle parking facilities in the ratio of 0.63 spaces per dwelling unit (0.5 tenant space/unit and a 0.12 visitors space/unit).
8. There shall be 200 bicycle parking spaces in the complex as a whole, split between residents and visitors in accordance with the current By-law.

9. Indoor at grade amenity space in the new building shall be not less than two square metres for each dwelling unit, provided that such space shall be available to all tenants in the entire complex.
10. Not less than 450 square metres of indoor amenity space shall be provided in the building known as 323 Rusholme Rd. Such space may be below grade, and is to be available to all of the tenants of the entire complex.
11. All indoor amenity space shall be provided with security features in such a way that tenants from buildings other than the one in which the space is provided do not have a right of access to other parts of the building.

The Board agrees that the following constitute appropriate elements of a s. 37 agreement:

- a) The owner will contract for the installation of new high-speed elevators in the existing buildings, at a cost of not less than \$800,000.
- b) The owner will provide a consolidation of the at-grade garbage storage facilities, with such enclosure visually screened at the sides and from above, of a size to accommodate all the garbage containers normally generated by buildings on the site, at a cost of not less than \$40,000.
- c) The owner will rebuild the garage entrance off Dovercourt.

- d) Subject to the rights of the tenant of 309 Rusholme Rd, the owner will eliminate the garage at that location, re-orient that building's private outdoor space, and renovate/improve the building and grounds, at a cost of not less than \$100,000.
- e) - The owner will provide substantial improvements to the landscaping of the entire complex at a cost of not less than \$260,000, such work to be completed within one year of completion of the new building.
 - The owner will upgrade or otherwise reconstruct the emergency exit stairwells leading from the parking garage to the common outdoor space, in such a way as to prevent access to the stairwells from the surface, and to permit persons on the surface to see whether anyone is in the stairwell, at a total cost of not less than \$50,000.
- f) The owner will renovate and upgrade the rear lobbies of the existing buildings so as to provide a more pleasing access from common amenity space, at a total cost of not less than \$75,000.
- g) The new building's design and construction will be pursued in consultation with the Better Buildings Division of the City, to achieve green infrastructure objectives.
- h) The owner will renovate the required tenant amenity space (the "pool/sauna" area) at 323 Rusholme Rd, and will provide furnishings and equipment for all of that indoor amenity space, following consultation with representatives of tenants, at a cost of not less than \$350,000.

- i) - The new building will be constructed and rented as purpose-built rental housing, with initial rents no higher than 150% of the average rents for the City of Toronto, as reported by Canada Mortgage & Housing Corporation from time to time.
 - No application for condominium conversion or demolition of the new building will be made before the year 2013.
- j) - The owner will agree to make no application for rent increases, above the regulated guidelines, in respect of any of the works listed in (a) to (i) above or (k) below.
 - As units in the existing buildings become vacant, they will be re-rented with rents no higher than 150% of the average rents for the City of Toronto, as reported by Canada Mortgage & Housing Corporation from time to time.
 - No application for condominium conversion or demolition of the existing buildings could will be made before the year 2013.
- k) The owner will provide \$40,000.00 to the City for improvement of park facilities specifically at Dufferin Grove Park.

The Board also agrees that the site plan should, in due course, heed the following considerations as agreed by the owner:

- The owner will provide a tot lot, and consider providing a

separate young children's play area, as part of the site plan approval. The location, size, design and equipment of such facilities will be determined as part of the site plan review process, but it is expected that a cost of no less than \$85,000 will be involved. The owner will agree, as part of the section 41 agreement, that the parents and care-givers of children in the neighbourhood may use such facilities, with the owner able to exclude any person at its reasonable discretion.

- The site plan will show walkways traversing the site. The owner will agree, as part of a section 41 agreement that members of the public may use such walkways, with the owner being entitled to exclude any person at its reasonable discretion.
- Out of the total of 200 bicycle parking spaces, the owner will provide at least 40 outdoor bicycle parking spaces for visitors and selected tenants.
- Notwithstanding the primary use of outdoor amenity space for the common benefit of the residents of the complex, the site plan will provide outdoor patio areas of approximately 65 square metres for each of the 3 existing buildings, furnished in a way suitable for picnics or for charcoal barbecues, such as those located in public parks. These areas will be visually demarcated in a way that will indicate their suitability for use by residents of the adjacent building.

Although the Board will not specify what negotiations and consultations should occur to give effect to the above, the Board observes parenthetically that in view of the

acknowledged difficulties in communication so far, it may be in all the parties' self-interest to consider the DGRA's suggestion of striking a working group.

Once the Board has received the Official Plan Amendment and revised Zoning By-law, and a copy of a draft concept site plan for information purposes, the Board will issue an Order approving the Official Plan Amendment and Zoning By-law. The Board expects to receive the above documentation by June 1st, 2006. If the parties encounter difficulties in that respect, the Board may be spoken to.

"M.C. Denhez"

M.C. DENHEZ
MEMBER

M.F.V. EGER
VICE-CHAIR

ATTACHMENT 1: BUILDABLE AREA

The following are the specifications for the maximum buildable area for the podium. For reference, they are based on the footprint of the owner's proposal, as illustrated at Tab 42 of Exhibit 7, Vol. II.

East:

The Board generally approves the "three-storey element" and "five-storeys" segment facing Dovercourt, including the five-metre setback along Dovercourt for the "3 storey element" of the owner's proposal, and the nine-metre setback for the "5 storeys" element. To incorporate the Dovercourt garage entrance into the façade as suggested by the City, the owner may, at its option, extend the "3 storey element" northward, with the same setback from Dovercourt, to the north property line. Similarly the owner may, at its option, extend the "5 storeys" element northward to the property line, at the same nine-metre setback from Dovercourt as currently illustrated.

South:

The Board approves the 20.5 metre setback between the "5 storeys" element and the building at 730 Dovercourt as illustrated (17 metres plus 3.5 metres). As suggested by the City's urban design expert, the owner may extend this component westward, subject to the upper-storey step-back requirements explained in the Decision. To minimize loss of greenspace, this extension may extend to the southwest corner of the existing parking lot.

North:

On the north the owner may, at its option, build to the property line, i.e. over the existing entrance to the parking garage, and thence westward to the northwest corner of the property abutting the lane, next to the stairwell in the corner of the existing parking lot.

West:

On the west, the buildable area shall extend to the western limit of the existing parking lot. However, subject to the applicable provisions pertaining to garbage loading areas, the owner may, at its option, extend the five-storey buildable area westward to include the area between the north property line and the southwest corner of the proposed garbage loading area, to incorporate the latter into the development. Any such westward extension beyond the existing parking lot may be built to five storeys, with the same upper-storey step-back on the west façade; however, the south façade of this extension, between its western limit and the current parking lot, need not include a step-back at the third and/or fourth storey.

Tower:

The Board approves the setbacks between Dovercourt and the east facades of the 13 and 15 storey tower components.

The other three facades of the tower are expected at approximately the same width, as the east façade currently illustrated in the owner's proposal.

The tower shall be located at least 30.5 metres to the north of the building at 730 Dovercourt.

Outdoor Amenity Area:

The outdoor amenity area for the new building need not be located exclusively in the "Buildable Area" described above.

