LOOPSTRA NIXON LLP
BARRISTERS AND SOLICITORS

Quinto M. Annibale*
***Quinto Annibale Professional Corporation**
Direct Line: (416) 748-4757
e-mail address: qannibale@loonix.com

VIA E-MAIL & COURIER

March 12, 2018

Mr. Bruce Krushelnicki
Executive Chair
Ontario Municipal Board
655 Bay Street, Suite 1500
Toronto, ON M5G 1E5

Dear Mr. Krushelnicki,

RE: Section 43 Request for Review of the City of Burlington
Adi Development Group Inc. v. Burlington (City)
Decision Issued: February 13, 2018
OMB Case No.: PL150274

We represent the City of Burlington (the "City") and are writing to advise that the City requests a review of the Decision in this matter pursuant to Section 43 of the *Ontario Municipal Board Act* and pursuant to Rules 110-119 of the Board's Rules of Practice and Procedure.

Overview

This Review Request arises from the decision issued on February 13, 2018, by Vice-Chair Schiller related to appeals in connection with the lands municipally known as 374 and 380 Martha Street (the "Subject Lands") in the City of Burlington (the "Board Decision").

The Applicant, ADI Development Group Inc. ("ADI"), had applied for site-specific amendments to the City's Official Plan and Zoning By-law with respect to 374 Martha Street. These applications were appealed to the Board by ADI for lack of decision on March 26, 2015. A staff report recommending refusal went to the City's Development and Infrastructure Committee meeting on March 30, 2015, and Council issued a refusal on April 20, 2015.

In October 2015, following acquisition by ADI of 380 Martha Street (abutting the original subject lands at 374 Martha Street), ADI filed a revised proposal. A staff report recommending refusal of the revised application went to the City's Development and Infrastructure Committee meeting on February 16, 2016, and Council issued a refusal on February 29, 2016.

The Board held a full hearing on the revised application on February 22 to 27, 2017, March 6, 2017, and July 17 to 21, 2017.

The Board issued the Board Decision on February 13, 2018, allowing the appeals in part, approving most elements of the revised proposal subject to finalization of language regarding a Section 37 contribution, and including four zoning conditions listed in Paragraph 165 of the Board Decision.

The City is making this Review Request for the reasons set out below. Generally, the reasons are (a) that the Board Decision incorrectly applies the Growth Plan in a manner that ignores the City's comprehensive planning exercises in implementing the Growth Plan, including the planning hierarchy within the Urban Growth Centre; (b) that the Board Decision does not properly have regard for the decisions of City Council and the material considered by City Council in making its decisions; (c) that the Board improperly excluded evidence of the City; and (d) that the Board Decision includes unreasonable findings with respect to tower separation. As a result of the errors, the Board Decision has the effect of severely restricting the ability of the City to direct and plan for growth in the City's Downtown, contrary to the intent and policies of the Growth Plan.

Material in Support of the Review Request

The reasons in support of the Review Request are discussed below. Enclosed is an Affidavit of Paul Lowes, stating the facts relied upon in this Request.

Relief Sought

The City is seeking the following relief arising from this review request:

1. An Order granting this Review Request and dismissing the ADI appeals in their entirety, and that the proposed Official Plan amendment and Zoning By-law amendment therefore not be approved;

2. In the alternative, an Order granting this Review Request and ordering a rehearing before a different panel of the Board at a date and time to be set by the Board;

3. In the further alternative, an Order granting this Review Request and amending the Board Decision to reduce the permitted height and density, and increase the tower setback requirements;

4. Such further and other relief as the City may request if this review request results in a rehearing before a different panel of the Board.

Reasons for the Review Request

(a) Incorrect Application of the Growth Plan

There is no consideration in the Board Decision of the planning hierarchy established within the Urban Growth Centre by City Council, which establishes a relationship between what

level of growth Council has directed for different areas and sites within the Urban Growth Centre.

Rather, the Board Decision determines that the Subject Lands can accommodate more height and density than permitted as of right in the Official Plan, and on that basis approves a building that is the tallest and most dense building in the Urban Growth Centre. Once the Board determined that the maximum height in the Official Plan (4 to 8 storeys) was too low, the Board Decision focusses almost exclusively on questions of compatibility with immediate neighbouring uses.

In doing so, the Board Decision ignores entirely the comprehensive planning exercise that the City undertook in order to conform to the Growth Plan and the direction provided by City Council through the Official Plan as to how and where growth should occur in the Downtown.

Critically, the Growth Plan defers to local area Official Plans to establish the details of where and what type of development is permitted through a strategy to achieve the minimum intensification target and intensification throughout the delineated built-up areas (Growth Plan 2017, Section 2.2.2.4). The City is not just *permitted* to identify appropriate type and scale of development as well as transition of built form to adjacent areas; the City is *required* to do so. The City has provided for areas of higher and lower densities within the Urban Growth Centre, directing the greatest growth to the Wellington Square and Old Lakeshore areas. The Subject Lands are not within these areas to which the Official Plan directs the greatest levels of growth, and yet the Board Decision (without consideration of the planning hierarchy) approves the tallest building in the City.

The City submits that the Board Decision correctly states at paragraph 106 that the required target for intensification is a minimum target, and that additionally, there is no test of "need" in either the PPS or the Growth Plan against which the Board is expected to consider a development proposal. However, the Growth Plan is clear that a municipality is to plan for at least the minimum target, and in doing so (and subject to meeting the other policies of the Growth Plan) it is up to the municipality to direct how the target is planned to be achieved. If the existing Official Plan designations and policies are sufficient to meet the minimum targets in the Growth Plan, then it is an error of law for the Board to ignore those directions in coming to its decision on a site-specific development application.

In this respect, the Board Decision is inconsistent with Board jurisprudence applying the Growth Plan, as presented to the Board in the hearing. In particular, we refer to the following:

- *2107639 Ontario Inc. v Toronto (City)*, 2010 CarswellOnt 99 (OMB) – City Book of Authorities Tab 1 at paragraphs 33 to 37
- *ADMNS Kelvingrove Investment Corp. v Toronto (City)*, 2010 CarswellOnt 2164 (OMB) – City Book of Authorities Tab 2 at paragraphs 54, 62 to 65
- *Dundas Residences Inc. v Toronto (City)*, 2015 CarswellOnt 20983 (OMB) – City Book of Authorities Tab 6 at paragraphs 70
- *Daraban Holdings Ltd. v Mississauga (City)*, 2013 CarswellOnt 1817 (OMB) – City Book of Authorities Tab 8 at paragraphs 126 to 127.

In the case at hand, it is a manifest error for the Board Decision to ignore the planning hierarchy established in the Official Plan and approve the highest density and heights in the Urban Growth Centre on a site planned for comparatively lower levels of density and height without providing justification or reason for doing so. The application must be judged within the contextual framework of the City's Official Plan, which has long since implemented the direction of the Growth Plan. As a result of doing so, the Board Decision severely restricts the ability of the City to direct and plan for growth in the Downtown, contrary to the intent and policies of the Growth Plan. Had the error not been made, it would likely have resulted in the Board reaching a different decision (either refusal of the application, or possibly an approval of a lower height and density).

It was within the Board's jurisdiction to find that the Subject Lands were suitable for higher levels of intensification than permitted as of right, without approving the ADI proposal in its entirety. The Board heard evidence, noted in the Board Decision at paragraph 109, from other planning (and urban design) witnesses that the Subject Lands could appropriately accommodate between 11 storeys (suggested by Ms. Bustamonte) to 16 storeys (suggested by Ms. Anderson as well as the City's urban design witness, Mr. Freedman). The Board Decision suggests in paragraph 114 that it had no evidence to assess the differential in relative compatibility with and impacts on surrounding land uses between the proposed development and these alternative heights; the Board Decision ignores however that it had expert evidence before it that these lower heights would more appropriately consider the established planning hierarchy.

The Board Decision makes specific reference to a new Policy in the 2017 Growth Plan, 2.2.4.9(d) which speaks to "prohibiting land uses and built form that would adversely affect the achievement of *transit-supportive* densities" within major transit station areas. The Board Decision appears to put significant emphasis on this, noting in paragraph 70:

> Just as the Province has steadily emphasized, and then required, intensification within settlement areas, the Province has now placed additional importance on supporting transit when considering proposed developments. Recognizing the importance of effective implementation of the GGH 2017, it is insufficient to refuse an OPA application on the basis that a municipality's official plan was brought into conformity with the GGH 2006 and therefore a decision to refuse a proposed OPA on that basis is a decision that conforms to the GGH 2017

and in paragraph 100:

> In implementing GGH 2017 policy 2.2.4.9(d) that is set out above, the Board must consider whether a four-storey development as of right with only a possibility of growing to eight storeys, as set out in the current City OP designation for the Subject Site, would 'adversely affect the achievement of *transit-supportive* densities'.

To the extent that the Board Decision relies on this policy and these statements, there was (a) no evidence before the Board to conclude that an eight storey building ought to be prohibited as

adversely affecting achievement of transit-supportive densities; and (b) there is no other element of the new 2017 Growth Plan cited for the statement that the City's Official Plan passed in conformity with the 2006 Growth Plan has become obsolete immediately upon the approval of the 2017 Growth Plan, which occurred during the Board hearing.

(b) Improper Regard for Council Decision and Materials Consider by Council

The Board Decision discusses its regard for the decisions of City Council under Section 2.1 of the Planning Act, in paragraphs 42 to 45. The Board Decision correctly notes in paragraph 42 that while the appeal was made on the basis of a non-decision, the City subsequently made two decisions, both being refusals. The first decision was to refuse the initial application, and the second was to refuse the revised application. The Board Decision however makes two errors in respect of what it must have regard to under Section 2.1.

The first error is factual. The Board states in paragraph 43: "Noteworthy in each of these two staff reports is the planning opinion that the particular proposal under consideration is consistent with the Provincial Policy Statement 2014 ("PPS 2014") and conform to the applicable provincial plans and conforms to the Regions growth policies." Staff Report PB-23-15 in fact contains the following summaries of opinion with respect to the PPS and the Growth Plan:

> **Planning Opinion on the PPS:**
> While the proposed development is consistent with the PPS **in principle**, the proposal represents over-intensification on a site that is too small and does not provide adequate setbacks, buffering, amenity space or parking standards. The significant reduction of numerous development regulations that are required to facilitate this intensification proposal on the subject property and **the failure to satisfy the City's Official Plan policies described in Section 8 of this report results in an application that is not consistent with the PPS**.
> (Ex. 1A, Tab 9, p. 314, emphasis added)
>
> **Planning Opinion on Places to Grow:**
> The subject applications generally conform to **the principles** of the Growth Plan by accommodating intensification in an area that is designated for intensification, and more specifically, within the Urban Growth Centre. However, the subject applications are not proposing an appropriate scale of development and the proposed development does not achieve an appropriate transition of built form to adjacent areas. **The City's existing intensification strategy is well positioned to meet the minimum density target established in the Growth Plan without significant changes to the existing Official Plan policies and permissions.** The City does not require the overdevelopment of one small property in the Urban Growth Centre in order to achieve the minimum density target.
> (Ex. 1A, Tab 9, p.317, emphasis added)

As the staff reports contain numerous and detailed reasons for the Council decisions, this error mischaracterizing the opinion of staff and Council with respect to the PPS and the Growth Plan

leads back to the error discussed above in failing to consider the overall planning hierarchy established in the Official Plan's implementation of the Growth Plan.

The second error arises in the Board Decision's consideration of the second staff report, which considered the revised application that was considered by the Board. The Board states in paragraphs 44 and 45:

> While the planning report on the first proposal was extensive and provided detailed analysis, the planning report on the revised proposal was quite short. This report had no substantive compatibility analysis on the revised proposal. The report simply asserts that the revised proposal is not compatible with the existing neighbourhood character.
>
> As a result, the Board is left with little to which regard might be had in terms of the planning reasons the staff, and perhaps the Council, considered in rejecting the revised proposal.

While the second report is certainly shorter than the first, the Board's statements err in overlooking the fact that the height, density and massing of the proposed building had not been significantly altered by the revision. The "Discussion" section of the second report PB-34-16 lists the revisions to the proposal and concludes: "Planning staff have reviewed the revised proposal and do not support the proposal nor the Official Plan and Zoning By-law amendments that would be required to facilitate the revised proposal **for the same reasons set out in staff report PB-23-15**." (Ex 1A, Tab 15, p. 3 of Report PB-34-16, emphasis added). Although not repeated verbatim in the second report, it is clear that the reasons in the first report continued to apply, contrary to the conclusion in the Board Decision that the Board had little to which regard might be had in terms of planning reasons.

(c) Improper Exclusion of Evidence – Supplemental Affidavit of Paul Lowes

The Board Decision discusses in paragraphs 71 to 89 its reasons for not allowing evidence filed by the City through a supplementary witness statement of Mr. Lowes prior to the recommencement of the hearing.

As the Board Decision notes in paragraph 80, the primary requirement for the Board to admit any evidence is the relevance of the evidence to the matter before the Board. The Board Decision notes correctly in paragraph 81 that the additional information in the Supplemental Witness Statement dealt with a slight change to the mapping of the Urban Growth Centre as a result of a decision on an amendment to the Region's Official Plan. The Region's Growth Plan Conformity Official Plan Amendment (ROPA 38) set a boundary that is not identical to the existing boundary in the City's Official Plan, although this was not apparent until detailed GIS files were provided by the Region. The Board finds in paragraph 82 that the evidence would not be relevant because the change in boundary does not change the status of the Subject Lands as being within the Urban Growth Centre.

It is accepted law that the Board should consider the best evidence available to it when making a decision. Regardless of when the City was advised of the change in the boundary by the Region, by not admitting this important evidence, the Board failed to consider the fact that the City had in fact met its Growth Plan intensification targets, and while (as stated above) the targets are a minimum, this error is especially critical to the issue of what regard must be had to Council's decision under Section 2.1 of the Planning Act. If it was important for the Board to consider the hierarchy for density established by the City in its Official Plan when the Board thought the City had not met its targets, it would have been even more important and more relevant had the Board known and considered that the City had in fact met its targets. In other words, by rejecting the Supplementary Affidavit the Board compounded its "have regard to" error on hierarchy.

(d) Unreasonable Findings with respect to Tower Separation

Mr. Freedman, the City's urban design witness, provided evidence that the proposed tower should have a greater setback from the west property line to ensure a sufficient tower separation when the lands to the west develop. The Board Decision refers to this evidence in paragraph 142. In paragraphs 141 and 142, the Board finds that the proposed 3 metre tower setback is sufficient, in part because the neighboring property owner indicated at the hearing that it consented to the setback and could accommodate a greater tower setback on its site.

In our submission it is an error to rely on the consent of a neighbouring property owner in the absence of a binding agreement that the neighbor agrees to accommodate an increased tower setback on its lands. In this case, there was not even an application submitted by the neighbouring property owner to illustrate what was proposed on those lands. The Board Decision is not binding on the neighbor when it applies for development on the neighbouring lands, and the result may be allow for a significantly deficient tower separation. As well, the neighbouring property might change hands and the new owner is not bound by decisions made by prior owners.

The visual evidence of Mr. Freedman indicated that a tower could still work on the ADI lands with a greater setback from the west property line. Had the Board not erred in coming to its conclusion on the sufficiency of the tower setback, it is likely that the decision would have been changed, if only to require a greater setback of up to 12.5 metres.

No Motion for Leave to Appeal

The City has not submitted an application for leave to appeal or judicial review to the court.

Conclusion

As a result of the above, we respectfully request on behalf of the City that you grant the City's Review Request and provide relief as described herein.

We note that the Board Decision withheld an Order for 45 days from the date of decision to permit the finalization of the proposed official plan amendment and proposed zoning by-law amendment, including finalization of language regarding a Section 37 contribution. The City is working to finalize these materials within the timeframe provided by the Board, notwithstanding this Review Request. Although the City is attempting to work within the time frame established by the Board to prepare these documents, the City requests that the Board's final Order continue to be withheld until such time as the Review Request has also been dealt with.

Enclosed is a cheque payable to the Minister of Finance in the amount of $300.00, the prescribed filing fee.

Yours very truly,
LOOPSTRA NIXON LLP

Per: Quinto M. Annibale