

**What Weight Should Municipally
Initiated Guideline Documents Be Given
in Land Use Planning Approvals?**

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What Weight Should Municipally Initiated Guideline Documents Be Given in Land Use Planning Approvals?

Introduction

The issue of what weight should be given to municipally initiated guideline documents in land use planning approvals has been the subject of significant debate over the years. In the recent decision of the Ontario Municipal Board (the “**Board**”) in *Dundas Residence Inc. v Toronto (City)*, Member Sutherland ruled in favour of the abutting landowner, Amexon Development Corporation (“**Amexon**”) in finding that the Dundas Residence Inc. (“**DRI**”) tall building tower must incorporate a 12.5 metre setback to the Amexon south property line in order to achieve a total separation distance of 25 metres between tall towers as contemplated by the City of Toronto Tall Building Design Guidelines, 2013 (the “**TBDG**”) ¹. DRI filed a Leave to Appeal application of the decision to the Divisional Court on the grounds that the Board erred in law by according inappropriate weight to the TBDG.

The matter was scheduled to be heard by the Divisional Court on February 7, 2016 but has been adjourned to March 10, 2016 to allow the parties to continue “without prejudice” settlement discussions. I had hoped that at the time of writing this paper we would have the Divisional Court’s ruling on the leave application, regretfully that is not the case. In the absence of a Divisional Court decision this paper will review the existing jurisprudence that addresses what weight should be accorded to municipal guidelines in the land use planning process and

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¹ *Dundas Residences Inc. v Toronto (City)* (21 July 2015) PL141461, at paragraph 89, online: Ontario Municipal Board < <http://elto.gov.on.ca/omb/e-decisions-omb/>>.

review whether the *Dundas Residence Inc. v Toronto (City)* decision establishes a different threshold. The main focus of the paper will be with respect to the City of Toronto TBDG.

What are Municipal Guidelines?

Land use planning approvals in the province of Ontario are governed by a policy hierarchy. The statutory framework is set out in the *Planning Act*² (the “Act”) which requires municipalities and approval authorities to ensure that all land use planning decisions are consistent with provincial statements and conforms with provincial plans such as the Growth Plan and the Provincial Policy Statement. In addition, the Act sets out a rigorous approval process for official plans and zoning by-laws. Municipally initiated guidelines, unless approved as an official plan policy, do not enjoy the same legal status as in force official plan policy or zoning by-laws. As stated by the Associate Chair of the Board, Lee in *Toronto (City) By-law No. 438-86, Re*:

“...guidelines are not part of the Plan unless the Plan has been specifically amended to incorporate them. They simply are not the same as the enshrined Official Plan policies.

They have not been tested by the vigour of the evaluation process pursuant to the Planning Act. As such, they do not enjoy the same legal status of the effective Official Plan or zoning by-law.”³

Therefore municipally initiated guidelines that are not part of a municipality’s official plan are not policy within the statutory framework of the Act. In fact section 5.3.2.8 of the City of Toronto Official Plan states that guidelines will be adopted to advance the vision, objectives and policies of its official plan and express Council policy, but are not part of the official plan

² *Planning Act*, RSO 1990, c P-13, as amended.

³ *Toronto (City) By-law No. 438-86, Re* (2014), 25 MPLR (5th) 150, 83 OMBR 109, at 29.

unless the Plan has been specifically amended to incorporate them⁴. The City of Toronto TBDG are not specifically incorporated in the City of Toronto Official Plan.

If a guideline is not specifically incorporated in a municipality's official plan what role does the guideline play in the municipal approval process? Board Member Rossi in *One-Ten Yorkville Ltd., Re*, describes the role of guidelines as follows:

“...the Board views guidelines as providing expression to a municipality's way of thinking when it comes to reading municipal policies in the assessment of general planning considerations and development applications widely. Guidelines cannot replace policy nor should they be elevated to the level of policy. They can serve, however, to give weight to policy considerations where they further delineate municipal areas and suggest how development should proceed in these areas.”⁵

In *Toronto (City) By-law No. 438-86, Re*, Associate Chair Lee describes the role of guidelines as follows:

“A punctilious insistence on the requirements of the guidelines without a thoughtful and responsive evaluation, in the Board's view, may have results less than felicitous. Nonetheless, designers and decision-makers such as Council or the Board should have regard for the Guidelines by evaluating their intents and in their applicability, attribute the requisite weight to inform one's opinion. It should be treated as a tool; not a millstone.”⁶

In reviewing numerous Board decisions it is clear that the Board consistently acknowledges that municipally initiated guidelines that do not form part of a municipality's official plan, do not constitute policy under the Act and therefore are not given the same weight as official plan policy or zoning by-laws. However when read in concert with relevant municipal

⁴ Toronto City Planning, *City of Toronto Official Plan*, June 2015 Consolidation (Toronto: City of Toronto, 2015) at 5.3.2.1. pages 5-14.

⁵ *One-Ten Yorkville Ltd., Re* (2014), 82 OMBR 461, at 15.

⁶ *Supra* note 3.

official plan policies, guidelines are considered an important tool that should not be discounted or overlooked.⁷

The City of Toronto Tall Building Design Guidelines (TBDG)

On May 8, 2013, Council of the City of Toronto adopted updated city-wide tall building design guidelines. The TBDG integrate and build upon previous Council-adopted tall building guidelines and establish a unified set of performance measures for the evaluation of all tall building development applications city-wide. The TBDG update and replace the “*Design Criteria for the Review of Tall Building Proposals*” (2006), as well as consolidate and substantially replace the “*Downtown Tall Buildings Vision and Performance Standards Design Guidelines*” (2012). Area-specific aspects of the Council-adopted Downtown Guidelines remain in the consolidated and renamed “*Downtown Tall Buildings: Vision and Supplementary Design Guidelines*” (2013). These updated Downtown Guidelines apply together with the city-wide guidelines for those applications located within the applicable Downtown area boundary.

A “tall building” is a building that is generally taller than the width of the adjacent street right-of-way or the wider of two streets if located at an intersection. As noted in the City of Toronto Official Plan, tall buildings are desirable in the right places but they don’t belong everywhere. When poorly located and designed, tall buildings can physically and visually overwhelm adjacent streets, parks and neighbourhoods. They can block sunlight, views of the sky and create uncomfortable wind conditions in adjacent street, parks and open spaces.⁸

The TBDG focus on how the design of new tall buildings should be evaluated to ensure that tall buildings fit within their existing and/or planned context and limit local impacts. The

⁷ *Supra* note 5 at 14.

⁸ *Supra* note 4 at 3.1.3. pages 3-9.

TBDG do not address where tall buildings should be located or how tall they should be on a specific site. As stated in the TBDG when it is determined that a tall building is supportable and represents “good planning”, the TBDG apply to inform the site and building design.⁹

As noted on page 16 of the TBDG they are intended to provide “a degree of certainty and clarity of common interpretation, however as guidelines, they should also be afforded some flexibility in application, particularly when looked at cumulatively”.¹⁰ The TBDG are not intended “to be applied or interpreted independently of each other, rather, each guideline requirement should be weighed across the board with the other guidelines and ‘work together’ to determine whether a tall building development application has successfully met the overall intent of these Guidelines and the Official Plan”.¹¹

The evolution of the TBDG has occurred over a number of years and after much analysis and study. As noted by Board Member Hefferon in *Toronto (City) Zoning By-law No. 438-86, Re*, he was reluctant to give little weight to the City of Toronto’s urban design guidelines as he considered the guidelines to be a clear policy of City Council and he was satisfied by the persuasive evidence at the hearing that the guidelines were prepared with “great care and professionalism”.¹² Even though the Board has consistently agreed that municipal guidelines, such as Toronto’s TBDG, must be accorded some weight, the amount of weight to be applied will depend on the clarity of the guidelines, the guidelines relationship to existing official plan policies and zoning by-laws and the facts of each individual case. As eloquently stated by Associate Chair Lee in *Toronto (City) By-law No. 438-86, Re*, “a punctilious insistence on the

⁹ Toronto City Planning, *Tall Building Design Guidelines*, May 2013 (Toronto: City of Toronto, 2013) at page 10.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Toronto (City) Zoning By-law No. 438-86, Re*, 2013 CarswellOnt 12198 (WL Can) (Ontario Municipal Board), at 194.

requirements of the guidelines without a thoughtful and responsive evaluation, in the Board's view, may have results less than felicitous".¹³ In other words although the Board should have regard to municipal guidelines the guidelines should not be considered slavishly but rather in the overall context of the facts of the case and within the approved policies of the municipality.

How Do The TBDG Relate to the City of Toronto Official Plan?

The TBDG do not exist in a vacuum but rather flow from the Built Form policies of the City of Toronto Official Plan, wherein it states in the introduction to section 3.1.2 the following:

“Great cities are built one building at a time, with each new building making a contribution to the overall urban design of the City. Developers and architects have a civic responsibility to create buildings that not only meet the needs of the clients, tenants and customers, but also the needs of the people who live and work in the area who will encounter the building in their daily lives.....Developments must be conceived not only in terms of the individual building site and program, but also in terms of how that site, building and its facades fit within the existing and/or planned context of the neighbourhood and the City. Each new building should promote and achieve the overall objectives of the Plan.”¹⁴

Section 3.1.3 of Toronto's Official Plan specifically sets out the policies applicable to tall buildings. The tall buildings policies state that “tall buildings come with larger civic responsibilities and obligations than other buildings”.¹⁵ In order to ensure that tall buildings fit within their existing and/or planned context and limit local impacts, additional built form principles will be applied to the location and design of tall buildings. Section 3.1.3.2 requires that tall building proposals will, at minimum, address key urban design considerations that include demonstrating how the proposed building and site design relate to the existing and/or planned context, as well as the tall building's relationship to other tall buildings.

¹³ *Supra* note 3.

¹⁴ *Supra* note 4 at 3.1.2. pages 3-6.

¹⁵ *Ibid* at 3.1.3. pages 3-9.

It is clear from reviewing the Built Form and Tall Building policies of the City of Toronto Official Plan that the objective that tall buildings are appropriately designed is necessary to meet the policies of the Plan and that the guidelines are a tool to assist in determining if the official plan objectives have been met.

Is the *Dundas Residence Inc. v Toronto (City)* decision consistent with Board Jurisprudence on the weight to be afforded to municipally initiated guidelines?

DRI submitted an application for a zoning by-law amendment to amend the City of Toronto Zoning by-laws to rezone a 0.29 acre property at 175-191 Dundas Street East and 235 Jarvis Street to a site specific zoning to permit a 47-storey mixed-use building. DRI appealed its rezoning application pursuant to s. 34(11) of the Act on the basis of Council's failure to make a decision within the statutory timeframe. At the commencement of the hearing Counsel for the City of Toronto informed the Board that the City fully supported the DRI rezoning application. Amexon, the owner of lands municipally known as 225 Jarvis Street, which lands immediately abuts the DRI site to the south, requested and was granted party status to the hearing.

The Amexon property is 1.14 acres in size and the site of the existing 14-storey Grand Hotel. The existing Grand Hotel is located 20 metres ("m") from the DRI property line. Amexon filed a rezoning application to redevelop its site for a mixed use development consisting of a 47-storey tower encompassing the retention of most of the existing Grand Hotel. The Amexon redevelopment proposal establishes a 12.5 m setback from the DRI property line.

The DRI development proposal consists of a podium with a setback of 1.71 m from the Jarvis Street lot line to provide a 6 m sidewalk. The ground floor will be setback an additional 1.29 m along Jarvis Street and 1 m along Dundas Street. The tower steps back at the fifth floor

providing a 3 m setback from the Jarvis and Dundas Streets lot line, 3 m from the east property lot line and 5 m from the south property lot line (the Amexon property). The proposal envisions an FSI at 29 times the area of the lot.

Amexon did not object to the DRI redevelopment of its lands save and except for the tower set back of 5 m to the Amexon property line. As noted by the Board in its decision, the issue of appropriate built form “proved one of the key issues at the hearing”.¹⁶ The Board heard evidence from both DRI’s planner and the City planner that the appropriate separation distance between tall towers in the TBDG is 25 m and this standard is appropriate and applicable to the assessment of the DRI application. Both the DRI site and the Amexon site have been identified in OPA 82 as potential sites for a tall building.¹⁷ In order to achieve a 25 m setback between two tall towers can only be achieved if Amexon “pushes its proposed building 20 m from the property line rather than the council approved 12.5 m since DRI’s property is too small to comply with council approved policy”.¹⁸ The Board further noted that “in other words, the DRI proposal only will work within the guidelines if part of its necessary setback is taken from the Amexon property – which will mean that Amexon will not be able to develop its own property with a potentially appropriate tower development the way it wishes”.¹⁹

The Board accepted the evidence of Amexon’s urban design witness and specifically his opinion that the relevant sections of the Official Plan and the TBDG would not support a tall building at the scale envisioned by DRI on its site. He stated that the application as submitted,

¹⁶ *Supra* note 1 at 24

¹⁷ City of Toronto OPA 82 establishes the Garden District Area Specific Policy for the area generally bounded by Carlton Street, Sherborne Street, Queen Street East and Jarvis Street. OPA 82 was approved by Toronto City Council on April 2, 2015 and appealed to the Board by seven (7) landowners. The hearing has not been scheduled (PL150374).

¹⁸ *Supra* note 1 at 41.

¹⁹ *Ibid* at 42.

fails to follow important TBDG provisions including setback, stepback and small site guidelines and as a result would have major detrimental impacts on the neighbouring properties as well as the adjacent public realm. He also concluded that although City staff agree that 25 m is the acceptable standard for a separation distance between two tall towers he found no planning justification that the standard should be split unevenly, and in fact the TBDG recommends a minimum tower setback of 12.5 metres from property lines to achieve the ultimate separation distance of 25 m.²⁰ The Board also agreed with Amexon's urban designer that no evidence had been supplied to demonstrate that the criteria for tall buildings had been established through a block by block analysis rather than a site by site analysis. The Board concluded that it had heard no good planning or urban design justification for allowing an oversized development on an undersized lot. The Board at pages 11 and 12 of the Decision carefully reviews the relevant Built Form and Tall Buildings policies of the City's Official Plan prior to determining the weight to be afforded to the TBDG. In determining what weight to afford the TBDG the Board noted the following:

“All parties acknowledged that the TBDG are guidelines and not policy. They are, as Mr. Freedman stated, intended to assist in the implantation of the OP policies for built form and tall buildings and establish a unified set of guidelines for the evaluation of all tall building development applications across the City. In short, the TBDG inform the built form policies of the OP and assist in their implementation. They can neither be ignored nor their relevance dismissed or downplayed.”²¹

Ultimately the Board determined that in the final analysis the two issues upon which its decision turns was the question of “whether the proposed building is too big for the subject property, and whether it is reasonable to make up for the inadequacies of the subject property by effectively, and without consultation, taking land from Amexon to make it fit and, by so doing

²⁰ *Ibid* at 75.

²¹ *Ibid* at 51-52.

making it impossible for Amexon to develop its property with a potentially appropriate tower development in the manner it wishes”.²² Based on the facts and evidence of the case presented at the hearing the Board concluded as follows:

“Guidelines are indeed just guidelines, but the TBDG have, quite justifiably, weighed heavily in the City’s consideration of development applications. They inform the OP and the implementation of its policies. Mr. Smith stated that the TBDG are intended to facilitate tall buildings, not to be used to preclude them. But, the TBDG are clear that not every site is suitable for a tall building, and that tall buildings must meet the Built Form policies of s. 3.1.2 of the OP which emphasize the importance of ensuring that new development fits within its existing and/or planned context. The Board does not consider the TBDG sacrosanct. There is sometimes need for flexibility. In the application before it, however, the City applied the 25 m setback vigorously, giving to one Party while taking from another.

The PPS (2014) and the Growth Plan both encourage intensification, but not intensification at all costs. It is not necessary or desirable to over-intensify individual development sites in order to accommodate growth projections.

In this regard, the Board is persuaded by the opinions of Mr. Freedman and Mr. Gagnon that the application, as it stands, represents over-intensification, and in so doing, undermines the policies of the PPS, GP and specifically the OP as it relates to Built Form and development within Mixed Use Areas....

...The proposal cannot achieve the 25 m separation distance on its own site. If that distance is not achieved, light, view, skyview, privacy and wind issues ensue, exacerbated by the scale of the proposed DRI building. The application fails to meet the Built Form objectives of the OP.”²³

The Board allowed the appeal in part but withheld its order pending receipt of a modified proposal from the Applicant that incorporates a 12.5 m setback from the south property line. A careful review of Sutherland’s decision illustrates that her approach regarding the appropriate weight to assign the TBDG is consistent with Board jurisprudence.

²² *Ibid* at 58

²³ *Ibid* at 69-71, 83.

A Discussion of the *CHC MPAR Church Holdings Inc. v Toronto (City)* Decision

In November of 2015 Member Rossi refused a rezoning application filed by CHC MPAR Church Holdings Inc. for a 32-storey, mixed use development to be located on lands municipally known as 412 Church Street in the City of Toronto. The applicant was proposing to build a four-storey podium with commercial and retail uses at grade, together with a 28-storey tower, creating a structure at 32-storeys overall. The four-storey podium component of the tower would abut the heritage-designated Stephen Murphy Houses and Store to the north at a separation distance of 0 metres. The proposed building base would be set back from the adjacent low-rise McGill Granby residential neighbourhood to the west by 7.7 metres. The tower would be set back 10 metres from the westerly property line that abuts the low-rise neighbourhood. The tower would be set back 2.5 metres from the Church Street frontage and 2.0 metres from the McGill Street frontage. The north façade of the tower would be built flush with the north-abutting property line at 414 Church Street.

The applicant appealed its rezoning application to the Board on the basis of Council's failure to make a decision in a timely manner. The application was opposed at the Board by the City, the owner of 414 Church Street and residents from the McGill Granby neighbourhood. Member Rossi in his written reasons stated that the main issue for the Board to determine would be the impacts of the project on the adjacent listed and designated heritage structure.²⁴ Rossi stated that "The Board had to be satisfied that the proposed development offers workable and supportable planning, architectural and design responses in relation to 414-418 Church Street

²⁴ *CHC MPAR Church Holdings Inc. v Toronto (City)*, (23 December 2015) PL141140, at paragraph 9, online: Ontario Municipal Board < <http://elto.gov.on.ca/omb/e-decisions-omb/>>.

and 86 McGill Street and that these had sufficient and satisfactory regard for the applicable heritage polices of the relevant planning documents”.²⁵

Ultimately after reviewing the evidence of various land use planners, urban design/architectural witnesses and heritage witnesses, the Member refused the application concluding that the proposed tall building with “minimal setbacks, lack of appropriate transition and failure to respond to the particular development limitations and heritage factors of its immediate context all serve to confirm that this development does not represent good planning”.²⁶ Of particular interest in this case was the Member’s review of the various policies and municipally initiated guidelines relevant to his decision. The Member concluded that section 2.6 of the Provincial Policy Statement, 2014 required that significant built heritage resources shall be conserved.²⁷ As well the Member reviewed various policies of the City of Toronto’s Official Plan specifically, section 3.1.5, being the Heritage Conservation section that emphasizes the importance of cultural heritage features. Lastly the Member reviewed the role of various municipal guidelines and noted as follows:

“Instructive to the Board is a trio of municipal guidelines that informs the built form policies of the City’s Official Plan and assists in their implementation. Guidelines such as these are applied during the evaluation of proposals in the development approval process and the City uses these to advance its Official Plan policies, goals and objectives.....

The various municipal guidelines are not simple documents; they cannot be so easily relegated to some lesser and inconsequential reading when it comes to testing the appropriateness of development applications in the policy context. Invariably, the Board acknowledges that the following guidelines are not policy in the sense of official plan instruments and policies are accorded greater weight. Nevertheless, guidelines assist in the implementation of the Official Plan policies for built form and tall buildings and serve as a unified set of guidelines for the evaluation of all tall

²⁵ *Ibid* at 11.

²⁶ *Ibid* at 49.

²⁷ *Ibid* at 24.

building development applications. They help to translate the Official Plan's directions into desired outcomes for the design of buildings and in this case, for the conservation of heritage resources. No matter how the Applicant's counsel and witnesses submitted that the guidelines carry little determinative weight, these documents are important component considerations in the Board's overall evaluation of the appropriateness of the proposed development's design in relation to its surroundings. Accordingly, the Board deems it necessary to include the relevant considerations of these guidelines and yes, to evaluate how well the Applicant's proposal incorporates the approach and to accord weight to them given their role in interpreting the municipal policy context and insofar as the heritage conservation issue is concerned in this case. Lastly, the tenor of one set of these guidelines in particular as referenced below is replete with references to the importance of conserving the heritage attributes of heritage properties. This enable the Board to undertake what the Applicant's counsel called an entire and purposive reading of these materials just as it did with the policy documents".²⁸

Ultimately the Member determined that the development proposal did not meet the policy documents nor the municipal guideline documents. In particular, the Member noted that a respectful separation distance is a critical component for conserving the heritage attributes of 414-418 Church Street. He found that a 0.0 metre setback of a large building with the much smaller heritage building would create an unacceptable impact on the north property and would "greatly impede any development opportunity for 414-418 Church Street however modest it might be and diminishes the attributes that make these buildings worthy of preservation".²⁹

Conclusion

Although the issue of what weight should be given to municipally initiated guideline documents in land use planning approvals has been a matter of some debate over the years it is clear from reviewing past and recent decisions of the Board that guidelines cannot be ignored. The Board acknowledges that municipally initiated guidelines that are not part of a municipality's official plan are not policy within the statutory framework of the Act. However,

²⁸ *Ibid* at 31-32.

²⁹ *Ibid* at 82.

municipally initiated guidelines do express Council policy and are intended to advance the vision, objectives and policies of municipal Official Plans. Guidelines that flow from clear articulated Official Plan policies are considered an important tool that should not be discounted or overlooked. This does not mean that guidelines should be rigidly applied, rather, regard should be had to the guidelines and in particular their intent and relevancy to existing Official Plan policies. The applicability of weight to be applied to any particular guideline will depend on the facts of each case and the approved policies of the municipality.