

ISSUE DATE:

**March 19, 2014**



Ontario

Ontario Municipal Board  
Commission des affaires municipales de l'Ontario

PL121287

Dun West Properties Ltd. 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 neglect to enact a proposed amendment to Zoning By-law 438-86, as amended, of the former City of Toronto to rezone lands respecting 2376 Dundas Street West to permit the development of a eight-storey mid-rise mixed-use building and a 23-storey tower  
O.M.B. File No.: PL121287

IN THE MATTER OF subsection 41(12) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Subject:	Site Plan
Referred by:	Dun West Properties Ltd.
Property Address/Description:	2376-2388 Dundas Street West
Municipality:	City of Toronto
OMB Case No.	PL121287
OMB File No.	PL130743

**APPEARANCES:**

**Parties**

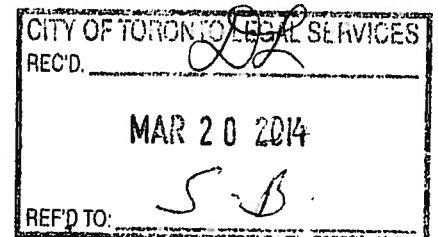
Dun West Properties Ltd.

City of Toronto

**Counsel**

Jane Pepino  
Andrea Skinner

Stephen Bradley



**DECISION DELIVERED BY SYLVIA SUTHERLAND AND ORDER OF THE BOARD**

[1] Dun West Properties Ltd. ("Dun West") has appealed to the Board pursuant to s. 34(11) and s. 41(12) of the *Planning Act* ("Act") from a non-decision by the City of Toronto ("City") with respect to an application for Zoning By-law Amendment ("ZBLA") and Site plan approval to permit a mixed-use residential tower of 23 storeys on a property at 2376 Dundas Street West ("subject property").

## **HISTORY**

[2] The subject property is located along the eastern side of Dundas Street West, north of Bloor Street West. On November 29, 2011, the original application for ZBLA was filed with the City to permit the construction of a new nine-storey mixed use building and a 26-storey tower connected with a three-storey podium. Following community meetings, and in response to concerns expressed by the community, a revised proposal was filed on June 25, 2012 for an 8-storey mid-rise building along Dundas Street West with a 23-storey component at the rear of the subject property.

## **SUBJECT PROPERTY**

[3] The subject property, currently vacant, is approximately 0.58 ha. It is bounded by a retail plaza and an associated parking lot to the north, the CN/GO corridor to the east, two 29-storey apartment buildings ("Crossways") to the south and Dundas Street West to the west. It is across the street from the TCC Dundas West subway station and in proximity to the Bloor GO train station. The proposal includes a pedestrian walkway at the southern edge of the site to provide a connection to the Bloor GO Transit.

[4] The subject property is located along an "Avenue" and is designated "Mixed Use Areas" under the City's Official Plan ("OP"). It is zoned MCR T4.0 C1.5 R3.0 by By-law No. 1222-2009, Mixed Commercial Residential. An amendment to the Zoning By-law ("ZBL") is necessary as the existing zoning designation does not permit the requested density and height. The amendment to the ZBL would permit a total of 25,211.5 square metres of gross floor area ("GFA"), comprised of 24,752 square metres of residential GFA, resulting in a total density of 4.4 times.

## **HEARING**

[5] Pino Di Mascio gave expert land use planning evidence and opinion on behalf of Dun West, and Mark Sterling gave expert evidence and opinion on architecture, urban design and land use planning integration on behalf of Dun West.

[6] Anne McIlroy gave expert land use planning and urban design evidence and opinion on behalf of the City. Janet Lee gave expert urban design evidence and opinion

and Dan Nicholson gave expert land use planning evidence and opinion, also on behalf of the City.

[7] The following were granted Participant status at the hearing: Doug Carroll, Jonquil Eyre, Timothy Noronha, Aubrey H. Friesner, Stephen Price, Barbara Gordon, Margaret McGookin, Harry H. Cornelius, Mary Jo Leddy and Bennett Mills. All were residents of the area, and all spoke in opposition to the application.

## FINDINGS

[8] The unique size, depth and location of the subject property were critical to the outcome of this hearing.

[9] It was Mr. Di Mascio's opinion that the intensification and redevelopment opportunities for the subject property have been identified by the OP through its designation of the area as an intensification corridor and a transit station area, but that the six and seven storey built form on the subject site provided for by the Avenue By-law does not promote, or even support the Province's existing and planned transit infrastructure, given that the subject property is located immediately adjacent to multiple transit services and a provincially designated Mobility Hub.

[10] It was his opinion that the proposed land use and density are appropriate for an area with significant transit infrastructure and substantial transit investment, such as the Dundas West TTC subway station, the Bloor GO station and the Union Pearson Express rail link presently under construction.

[11] Policy 1.7 of the Provincial Policy Statement ("PPS") states:

Long-term economic prosperity should be supported by:

c) promoting the redevelopment of *brownfield sites*;

d) providing for an efficient, cost-effective, reliable multi-modal transportation system that is integrated with adjacent systems and is appropriate to address projected needs.

[12] Policy 4.5 states:

The official plan is the most important vehicle for implementation of this Provincial Policy Statement.

Municipal official plans shall provide clear, reasonable and attainable policies to protect provincial interests and direct development to suitable areas.

In order to protect provincial interests, planning authorities shall keep their official plans up-to-date with this Provincial Policy Statement. The policies of this Provincial Policy Statement continue to apply after adoption and approval of a municipal official plan.

[13] It was Mr. Di Mascio's opinion that his evidence established that the proposal before the Board advances the goal of these policies of the PPS, which the City's position does not protect either the identified provincial interests or the provincial investment.

[14] There are numerous provincial plans specifically addressing intensification targets such as the Big Move Regional Transportation Plan (Exhibit 1, Tab 25), the Big Move Mobility Hub Backgrounder (Exhibit 1, Tab 27) and the Province's Transit-Supportive Guidelines (Exhibit 1, Tab 45). These documents are relevant to this application since they give provincial guidance on how to define appropriate density when dealing with a provincially designated Mobility Hub in order to protect and advance the Provincial interest.

[15] In a way that could have not been visualized probably even a decade ago, public transit has become an issue of primary provincial concern, focus and challenge.

[16] The fact that the subject property is a provincially designated Mobility Hub was not taken into consideration when the Bloor-Dundas Avenue Study ("Avenue Study") was undertaken in 2009, nor was the size of the site nor its development potential as a result of these two factors. The Avenue Study simply used a 1998 Board decision as a basis for the development potential of the subject property – notwithstanding, as Mr. Di Mascio pointed out, "the fact that that decision was never implemented and both the municipal and provincial planning frameworks and policies have changed significantly since that time." It was his opinion that "the development intensity suggested for the subject property in the Avenue Study is well below the eventual density recommended without any discussion on how this will or should impact the built form and recommended height on the subject property." He further stated that "the height provisions contained in the implementing ZBL, as they apply to the subject property, are in conflict with the Avenue Study report, with no discussion on the matter, or justification and analysis provided."

[17] It was Mr. Di Mascio's opinion the subject property, being next to a major transit station, should have been looked at in a site-specific manner in order that an appropriate recommendation be made with regard to its built form and development potential. This was not done, and to this extent let down the residents who so eagerly and willingly spent both time and energy in examining and determining the desired future of their area. Had the subject property been identified as an "Opportunity Site", had more attention been paid to its unique size and situation, there may have been a better understanding and appreciation of why it is different than other sites in the area, including the much smaller site that houses the so-called, "Giraffe" property at 1540 Bloor Street West. The fact that there is no other site, including Union Station (Exhibit 1, Table 27), in the City that has the same confluence of transit services and investment is surely something that should have been considered during the Avenue Study.

[18] It is true, as the City maintained, that one of the purposes of the Avenue Study was to create appropriate built form zoning regulations for the area, and that, in this regard, the study's recommendations were that the Avenues should be predominately mid-rise, with some elements up to 15 storeys in justified locations. Ms. McIlroy told the hearing that she could see a 15-storey tower on the subject site, but nothing higher. She said this was consistent with the recommendations of the Avenue Study.

[19] Counsel for the City, as well as many of the participants, urged the Board to "not lightly set aside" the findings of the Avenue Study. This, the Board has not done. The Board recognizes and respects the local knowledge and opinions of the residents of the area. It has, however, concluded on the basis of the evidence before it, that the findings of the Avenue Study were flawed in that they did not review or consider the unique features of the subject property.

[20] Section 27.3(5) (b) of the Act (Exhibit 1, Tab 8) states that:

A decision of the council of a municipality, a local board, a planning board, a minister of the Crown and a ministry, board or commission or agency of the government, including the Municipal Board, in respect of the exercise of any authority that affects a planning matter shall conform with the provincial plans that are in effect on that date, or shall not conflict with them, as the case may be.

[21] Section 2 of the Act identifies specific matters of provincial interest, among them (f) "the adequate provision and efficient use of communication, transportation, sewage

and water... systems", (m) "the co-ordination of planning activities of public bodies", (p) "the appropriate location of growth and development" and (q) "the promotion of development that is designed to be sustainable, to support public transit and to be oriented to pedestrians."

[22] It is difficult to disagree with Mr. Di Mascio's opinion that Dun West's proposal promotes development that is designed to support public transit and is oriented toward pedestrians. The proposed development will help facilitate improved transit infrastructure and connections in the area by providing a pedestrian walkway to a direct connection to regional, urban and local transit in the area, and a potential second entrance and exit to the Dundas West TTC station and the Metrolinx Passenger and Drop-off facility.

[23] Policy 1.1.3.3 of the Provincial Policy Statement (Exhibit 1, Tab 13), states:

Planning authorities shall identify and promote opportunities for *intensification* and *redevelopment* where this can be accommodated taking into consideration existing building stock or areas, including *brownfield sites*, the availability of suitable existing or planned *infrastructure* and *public service facilities* required to accommodate projected needs.

[24] It was Mr. Di Mascio's opinion that intensification and redevelopment opportunities for this site have been identified and promoted by the City's OP through its designation of the area as an intensification corridor and a transit station area. The proposed development will create 369 new residential units, supporting the growth and intensification of housing on a site supported by both hard and soft infrastructure.

[25] In many of its aspects, the Growth Plan for the Greater Golden Horseshoe ("GP") (Exhibit 1, Tab 15), mirrors the PPS. Where there is a conflict between the GP and the PPS, the GP prevails. In the proposal before the Board, there is no identified conflict. It was Mr. Di Mascio's opinion that the proposed development promotes and provides the appropriate level of intensification to promote the Crown's investment in commuter rail improvements on the adjacent rail corridor and the expansion of the existing station and related facilities, while the City's proposed restriction on density and height does not. The Board agrees.

[26] The City acknowledged that the proposed development does not require an OP amendment (Exhibit 1, Tab 47). Dun West maintains that, as a result, on a *prima facie*

basis, the provisions of the OP are considered to be met. The City, however, held that a failure to adhere to the Avenue Study, or By-law, constituted a failure to conform to the OP.

[27] Mr. Di Mascio, Ms. McIlroy and Mr. Nicholson agreed that, based on an explanatory text on pages 2-16 of the OP, an application that is filed before, during or after the completion of an Avenue Study must be evaluated against the criteria set out in the OP, as well as other relevant policy documents, including all provincial policies. The Board finds that Dun West's evidence did so in a more thorough and balanced manner than the City's.

[28] The Board also found Mr. Sterling's evidence more convincing than Ms. Lee's regarding the appropriateness of the residential density, scale, mass and built form of the tower and podium heights of the proposed development given the principles of good planning and urban design and the relevant provision of the Act, PPS, GP and other relevant policy documents and guidelines.

[29] Mr. Sterling explained that the location of the proposed 23-storey building on the subject property is set back 56 m from Dundas Street West. It was his opinion that this is an appropriate transition distance to the adjacent low rise neighbourhood to the west. The proposed point tower is set back 47 m from the adjacent slab towers of the Crossways buildings to the south, and it is Mr. Sterling's opinion that this provides sufficient horizontal separation distance to provide an appropriate transition from this complex. In addition, there is the insertion of an intervening eight-storey component, which will provide the appropriate streetscape along Dundas Street West.

[30] The Board found Mr. Sterling's Sun Shadow Study (Exhibit 10) and his View Comparison (Exhibit 11) convincing in regard to the minimal shadow and visual impacts of the proposed development, and finds that the intent of the 2013 Tall Building Guidelines has been satisfied in this regard.

[31] The City and some of the participants argued that the proposed development will set an inappropriate precedent for other potential developments within the area governed by the Avenue By-law. Dun West's maintains that it will not because the subject property is unlike any other site in the area due to its size, its location well removed and buffered from any other neighbourhood (unlike the Giraffe site), its direct connectivity to the

Metrolinx and TTC stations, is designation as a Mobility Hub. The Board finds Dun West's position in this regard convincing.

[32] The proposed mid-rise form is appropriate for those parts of the Avenues approximate to or abutting Neighbourhoods, unlike the subject property. It is to be noted that both Mr. Di Mascio and Mr. Sterling supported the refusal of an earlier application for intensification on the Giraffe site.

[33] As to the issue of s. 37 benefit (Issue 9 of the Issues List). These were outlined for the first time in Mr. Nicholson's witness statement (Exhibit 19) and comprised:

- Bloor-Dundas intersection improvements
- funds for the acquisition of local parklands and improvements
- pedestrian lighting and streetscaping as part of the Bloor-by-the Park BIA Streetscape Improvement Plan
- building design and construction consistent with the Toronto Green Standard
- public art

[34] Section 37 benefits must, in the words of Vice Chair Schiller in *Davenport Three Division Inc. v. Toronto (City)* [2006 CarswellOnt 3598, 53 O. M. B. R. 157], be grounded in fair, clear transparent, predictable and specific requirements that are set out in the official plan and are not arbitrary in their application.

[35] Vice Chair Schiller continues, "The Board adopts the analysis in Decision/Order 1585, and also known as the *Minto BYG* decision. An applicant should know what would be expected by way of s. 37 benefits if increases in height and density were approved.... *Minto BYG* also made clear that the benefits must relate to the development."

[36] *Minto BYG* further stated that it "lies with the municipality to demonstrate the connection between the proposal and the benefits."

[37] This, the City failed to do. Mr. Nicholson presented the Board with what could, at best, be described as a "wish list", without a clear connection to the proposed development.



[38] At the very least, the City had a responsibility to discuss this list of proposed benefits with Dun West prior to Mr. Nicholson outlining it in his witness statement.

[39] The Board finds that the City failed to establish the necessary connection between the s. 37 benefits it seeks and the proposed development.

**ORDER**

[40] For the reasons outlined above, the Board orders that the appeal is granted and:

- (a) that the Draft Zoning By-law Amendment appended as Attachment 1 to this order be approved;
- (b) that the Revised Site Plan be approved in principle in the form marked as Exhibit 5.

"Sylvia Sutherland"

SYLVIA SUTHERLAND  
MEMBER

ATTACHMENT 1

Authority: Ontario Municipal Board Order issued on \_\_\_\_\_, 2014 in Board File No. PL121287

**CITY OF TORONTO**

**BY-LAW No. \_\_\_\_-2014(OMB)**

**To amend the General Zoning By-law No. 438-86 of the former City of Toronto respecting the lands municipally known as 2376 and 2388 Dundas Street West.**

Whereas the owner of the lands known municipally in the year 2013 as 2376 and 2388 Dundas Street West appealed a proposed zoning by-law amendment to the Ontario Municipal Board; and

Whereas the Ontario Municipal Board, by its Decision/Order issued on \_\_\_\_\_, 2014 in Board File No. PL121287, approved amendments to the former City of Toronto Zoning By-law No. 438-86, as amended, with respect to those lands;

Therefore pursuant to the Order of the Ontario Municipal Board, By-law No. 438-86 of the former City of Toronto is amended as follows:

1. Pursuant to Section 37 of the *Planning Act*, the heights and density of development permitted by this By-law are permitted subject to compliance with the conditions set out in this By-law and in return for the provision by the *owner* of the *site* of the facilities, services and matters set out in Appendix 1 of this By-law, the provisions of which shall be secured by an agreement or agreements pursuant to Section 37(3) of the *Planning Act*.
2. Upon execution and registration of an agreement or agreements with the *owner* of the *site*, pursuant to Section 37 of the *Planning Act*, securing the provision of the facilities, services and matters set out in Appendix 1 of this By-law, the *site* is subject to the provisions of this By-law, provided that in the event the said agreement(s) requires the provision of a facility, service or matter as a precondition to the issuance of a building permit, the *owner* may not erect or use such building until the *owner* has satisfied the said requirement.
3. Wherever in this By-law a provision is stated to be conditional upon the execution and registration of an agreement entered into with the City pursuant to Section 37 of the *Planning Act*, then once such agreement has been executed and registered, such conditional provisions shall continue to be effective notwithstanding any subsequent release or discharge of all or any part of such agreement.
4. Except as otherwise provided herein,
  - (a) the provisions of *By-law No. 438-86* shall continue to apply to the *site*; and
  - (b) *By-law No. 1994-0799*, of the former City of Toronto, as amended and approved by Order of the Ontario Municipal Board issued on February 2, 1998 (Board File No. PL956072) shall no longer apply to the *site*.
5. None of the provisions of Section 2(1) with respect to the definition of "*grade*" and none of the provisions of Sections 4(2)(a), 8(3) Part I 1 and 3(a), and 12(2)347 1(c)(d), 4 and

8(a), of *By-law No. 438-86*, shall apply to prevent the erection and use of a *mixed-use building* on the *site*, provided that:

- (a) the *lot* on which the building is located comprises at least the *site*;
- (b) the total combined *non-residential gross floor area* and *residential gross floor area* on the *site* shall not exceed 25,211.5 square metres, of which:
  - i. the total *residential gross floor area* shall not exceed 24,663.2 square metres; and
  - ii. the total *non-residential gross floor area* shall not exceed 584.3 square metres;
- (c) no part of any building or structure erected within the *site* shall be located above *grade* other than within a *building envelope*, with the exception of the following:
  - i. canopies, eaves, awnings and building cornices;
  - ii. light fixtures, ornamental and architectural elements, parapets, ventilation pipes, railing and fences, planters, trellises, window sills, underground garage ramps, landscape and public art features; and
  - iii. balconies, provided they extend no more than 1.7 metres beyond the associated *building envelope*;
- (d) the *height* of each portion of a building or structure erected above *grade* within the *site*, in respect of each *building envelope* area, has a maximum *height* in metres as shown following the symbol "H" on Map 2 for the corresponding *building envelope* area, except for:
  - i. the structural projections permitted in Section 5(c) of this By-law; and
  - ii. within the *building envelope* areas delineated on Map 2 as "H 16m", "H 21m", "H 28m", and "H 72m",
    - A. parapets are permitted with a maximum height of 0.9 metres above those height limits;
    - B. terrace and balcony railings, dividers, guard rails and balustrades, are permitted with a maximum height of 2.0 metres above those height limits; and
    - C. wind screens are permitted with a maximum height of 3.4 metres above those height limits; and
    - D. within the *building envelope* area delineated on Map 2 as "Mechanical Penthouse H 78m", guard rails are permitted with a

maximum height of 2.0 metres above that height limit;

- (c) the components of the building located within the *building envelope* area delineated on Map 2, as "Mechanical Penthouse H 78m", shall be used only as a mechanical penthouse and associated stair enclosures at any point between a height of 72 metres to 78 metres above *grade*; and
  - (f) the components of the building located within the *building envelope* areas delineated on Map 2 as either "H72" or "Mechanical Penthouse H 78m" shall have a maximum floor plate size of 750 square metres between a height of 28 metres to 72 metres above *grade*.
6. For clarity, all Appendices and Maps attached to this By-law are incorporated into this By-law and are deemed to be a part of this By-law.
7. A temporary *sales office* shall be permitted on the *site*.
8. Despite any existing or future severance, partition, or division of the *site*, the provisions of this By-law shall apply to the whole of the *site* as if no severance, partition or division occurred.
9. For the purpose of this By-law, the following expressions shall have the following meaning:
- (a) "*building envelope*" means a building envelope for each height area within the *site* as shown by an "H", and as delineated by the lines on Map 2 attached hereto;
  - (b) "*By-law No. 438-86*" means By-law No. 438-86, as amended, of the former City of Toronto being, "A By-law to regulate the use of land and the erection, use, bulk, height, spacing and other matters relating to buildings and structures and to prohibit certain uses of lands and the erection and use of certain buildings and structures in various areas of the City of Toronto";
  - (c) "*City*" means the City of Toronto;
  - (d) "*grade*" means 113.44 metres above Canadian Geodetic Datum;
  - (e) "*owner*" means the registered owner of the *site* or any part thereof;
  - (f) "*sales office*" means an office used exclusively for the initial sale and/or initial leasing of *dwelling units* or *non-residential* uses to be erected on the *site*;
  - (g) "*site*" means those lands outlined by heavy lines on Map 1 attached hereto; and
  - (h) each other word or expression, which is italicized in this by-law, shall have the same meaning as each such word or expression as defined in *By-law No. 438-86*.

**APPENDIX 1****SECTION 37 PROVISIONS**

The facilities, services and matters set out herein are the facilities, services and matters required to be provided by the *owner* to the *City* in accordance with an agreement or agreements pursuant to Section 37(1) of the *Planning Act*:

Provisions for transit improvements and transit-related matters including the owner agreeing to:

1. Convey, prior to issuance of an above grade building permit, an easement or fee simple conveyance to the City, Metrolinx and the TTC, at their election, for at-grade public usage of a 3.0 metre wide strip of land along the southern property line of the *site* for the purposes of providing a public pedestrian connection between the Metrolinx/GO Station and Dundas Avenue West, as shown on Drawing SPA 101, at no cost to the City, the TTC or Metrolinx.
2. Convey, prior to issuance of an above grade building permit, an easement or fee simple conveyance to the City, Metrolinx and the TTC, at their election, for the provision of lands for the creation of a Passenger Pick-Up and Drop-off Facility along the eastern portion of the *site*, as shown on Drawing SPA 101 at no cost to the City, the TTC or Metrolinx;
3. Convey, prior to issuance of an above grade building permit, an easement or fee simple conveyance to the City, Metrolinx and the TTC, at their election, for the provision of an area at the southeast corner of the *site* for the future construction of a TTC second exit and/or entrance facility from Dundas West subway station. This area includes approximately 160 m<sup>2</sup> at the P1 level as shown on Drawing SPA 202, and approximately 280 m<sup>2</sup> at the ground floor level, as shown on Drawing SPA 101.
4. The *owner* shall enter into an agreement with the *City* pursuant to Section 37 of the *Planning Act*, to secure the provision of the said facilities, services and matters, in a form satisfactory to the *City's* Solicitor with conditions providing for indexed escalation of financial contributions, no credit for development charges, indemnity, insurance, HST, termination and unwinding, and registration and priority of agreement.

