

**197 Redpath Avenue and 95 and 99 Broadway Avenue–
Residential Rental Demolition Application Under
Municipal Code Chapter 667 – Final Report**

Date:	January 21, 2015
To:	Toronto East York Community Council
From:	Director, Community Planning, Toronto East York District
Wards:	Ward 22– St. Paul's
Reference Number:	12 197254 STE 22 RH (12 146382 STE 22 OZ) (12 197250 STE 22 SA)

SUMMARY

An application has been made to demolish a three storey, 32 residential rental unit building, comprising 7 bachelor, 9 one-bedroom, 8 two-bedroom and 8 three-bedroom units at 197 Redpath Avenue and two previously owner-occupied houses at 95 and 99 Broadway Avenue. The demolition of the rental housing is prohibited without a Section 111 permit issued under the City of Toronto’s Rental Housing Demolition and Conversion By-law (Chapter 667 of the Municipal Code). The owner is proposing to replace the 32 residential rental units in a new condominium development. The replacement rental units are proposed to be on the third and fourth floors of the new building. The owner has obtained approval from the Ontario Municipal Board (OMB) to construct two new 34 storey towers, inclusive of a seven storey podium, with the full replacement of the 32 existing rental units within the building.

The Zoning By-law Amendment application for the proposed redevelopment was appealed to the Ontario Municipal Board (OMB) on May 24, 2013. In September 2013, City



Council directed staff to oppose the development at the Board. The proposal was revised in December 2013, reducing the total height from 38 storeys to 34 storeys. City Council directed Staff to continue to oppose the revised proposal. The rezoning to permit the proposed redevelopment was approved in principle by the OMB on June 19, 2014, with the order withheld until certain conditions, including finalizing the form of the by-law and securing a Section 37 Agreement that includes the replacement of rental housing.

This report provides the results of the negotiations on the rental housing matters, an overview of the development approved by the OMB and recommends the approval of a Section 111 permit under Chapter 667 and Chapter 363 of the Municipal Code for the demolition of the 32 existing rental units, subject to conditions. The conditions include the full replacement of the 32 rental units and the provision of tenant relocation assistance for eligible tenants, including the right for all tenants to return to occupy a rental unit in the new building. This report recommends entering into an Agreement under Section 111 to secure these conditions.

RECOMMENDATIONS

The City Planning Division recommends that:

1. City Council approve the application to demolish the 32 existing residential rental units located in the residential rental apartment building at 197 Redpath Avenue pursuant to Municipal Code Chapters 667 and 363 subject to the following conditions under Chapter 667 which provide for the replacement of rental housing as outlined in the report from the Director, Community Planning, Toronto and East York District, titled: "197 Redpath Avenue and 95 and 99 Broadway Avenue- Residential Rental Demolition Application under Municipal Code Chapter 667 Final Report ", dated January 21, 2015:
 - a. the owner shall provide and maintain thirty-two (32) residential rental units on the subject site as rental housing for a period of at least 20 years, comprising 7 bachelor, 9 one-bedroom, 8 two-bedroom and 8 three-bedroom units, as shown on the plans submitted to the City Planning Division dated December 10, 2014 with any revisions to be to the satisfaction of the Chief Planner and Executive Director, City Planning, and of which at least 4 bachelors, 3 one-bedroom, 3 two-bedroom and 4 three-bedroom units shall have affordable rents and the remainder shall have rents no higher than mid-range rents;
 - b. the owner shall provide tenant relocation assistance to eligible tenants, including: an extended notice period; financial assistance beyond the minimums of the *Residential Tenancies Act*; and the right to return to a replacement rental unit for all of the tenants (the "Tenant Relocation and Assistance Plan"), and that the Tenant Relocation and Assistance Plan shall be to the satisfaction of the Chief Planner and Executive Director, City Planning;

- c. the owner shall enter into and register on title one or more Section 111 Agreement(s) to secure the conditions outlined in (a) and (b) above and as described in the Draft Zoning By-law Amendment attached hereto (Attachment 2) to the satisfaction of the City Solicitor and the Chief Planner and Executive Director, City Planning; and
 - d. the owner shall enter into and register on title, a Section 118 Restriction under the *Land Titles Act* (to the satisfaction of the City Solicitor) agreeing not to transfer or charge those parts of the lands, comprising the 32 replacement rental units, without the written consent of the Chief Planner and Executive Director, City Planning or her designate, to assist with securing the Section 111 Agreement against future owners and encumbrances of the lands until such time as the City Solicitor determines that its registration on title is no longer required to secure the provisions of the Section 111 Agreement.
2. City Council authorize the Chief Planner and Executive Director, City Planning to issue preliminary approval to the application under Municipal Code Chapter 667 after the latest of the following has occurred:
- a. satisfaction or securing of the conditions in Recommendation 1;
 - b. after the Zoning By-law Amendment for the proposed development approved in principle by the Ontario Municipal Board on June 19, 2014 has come into full force and effect;
 - c. the issuance of the Notice Of Approval Conditions for site plan approval by the Chief Planner and Executive Director, City Planning or her designate, pursuant to Section 114 of the *City of Toronto Act, 2006*; and,
3. City Council authorize the Chief Building Official to issue a Section 111 permit under Municipal Code Chapter 667 after the Chief Planner and Executive Director, City Planning has issued the preliminary approval referred to in Recommendation 2.
4. City Council authorize the Chief Building Official to issue a permit under Section 33 of the *Planning Act* for all of the structures at 197 Redpath Avenue and 95 and 99 Broadway Avenue no earlier than issuance of the first building permit for excavation and shoring of the development approved by the OMB on June 19, 2014, and as provided for in the Draft Zoning By-law Amendment as attached to this report, and after the Chief Planner and Executive Director, City Planning has issued the preliminary approval referred to in Recommendation 2, which permit may be included in the demolition permit for Chapter 667 under 363-11.1 of the Municipal Code, on condition that:

- a. the owner erect a residential building on site no later than four (4) years from the day demolition of the buildings is commenced; and
 - b. should the owner fail to complete the new building within the time specified in Condition 4 (a), the City Clerk shall be entitled to enter on the collector's roll, to be collected in a like manner as municipal taxes, the sum of twenty thousand dollars (\$20,000.00) for each dwelling unit for which a demolition permit is issued, and that each sum shall, until payment, be a lien or charge upon the land for which the demolition permit is issued.
5. Authorize the appropriate City officials to take such actions as are necessary to implement the foregoing, including execution of the Section 111 Agreement.

Financial Impact

The recommendations in this report have no financial impact.

DECISION HISTORY

A Preliminary Report outlining this application was presented to the Toronto and East York Community Council on September 11, 2012. The Preliminary Report can be viewed at the following link:

<http://www.toronto.ca/legdocs/mmis/2012/te/bgrd/backgroundfile-49253.pdf>

On May 24, 2013, the solicitors representing the owner appealed the Zoning By-law Amendment application to the OMB, citing City Council's failure to make a decision within the time prescribed by the *Planning Act*.

On October 8, 2013, Toronto City Council considered the August 16, 2013 Request for Direction Report. This report can be viewed at the following link:

<http://www.toronto.ca/legdocs/mmis/2013/te/bgrd/backgroundfile-60735.pdf>

An OMB Pre-Hearing Conference was held on October 22, 2013. The applicant, City staff and Sherwood Park Residents' Association were identified as parties.

On December 16, 2013, City Council considered a Request for Direction Report from the City Solicitor dated December 16, 2013, and adopted the confidential recommendations. This report can be viewed at the following link:

<http://www.toronto.ca/legdocs/mmis/2013/mm/bgrd/backgroundfile-65218.pdf>

With respect to the rental housing demolition and replacement matters, City Council's recommendations for the settlement of the appeal, to satisfy the Official Plan policy on rental demolition included:

(Recommendation #2)

"Staff advise the Ontario Municipal Board of City Council's position that any redevelopment of the lands must also include the full replacement of the existing 32 rental dwelling units and a Tenant Relocation and Assistance Plan, including the right of tenants to return to the new rental units in accordance with the Official Plan, to the satisfaction of the Chief Planner and Executive Director, City Planning Division."

(And Recommendation #3)

"In the event the Ontario Municipal Board allows the appeal in whole or in part, City Council direct staff to request that the Board withhold any order to approve a Zoning By-law for the subject lands until such time as the City and the owner have presented a draft by-law to the Board that provides for securing the rental housing matters as outlined in Recommendation 2 of this report (August 16, 2013) from the Director, Community Planning, Toronto and East York District and a Section 37 Agreement incorporating these matters has been executed"

The OMB heard the case on the 24th of February 2014 and issued its decision on June 19, 2014 approving the proposed zoning application.

The final order is being withheld until certain pre-conditions are met, including that the form of the Zoning By-law Amendment be finalized and that the owner enter into a Section 37 Agreement.

The form of the Draft Zoning By-law Amendment is attached to this report as Attachment 2.

This property has not been the subject of a previous application for demolition or conversion of any rental units over the previous five year period.

ISSUE BACKGROUND

Proposal

This application for a Section 111 permit proposes to demolish a three storey rental apartment building with 32 residential rental units, and provide full replacement of the 32 residential rental units and tenant relocation assistance.

The owner has approval from the Ontario Municipal Board (OMB) to construct two new 34 storey towers inclusive of a 7-storey podium and 769 units and a 7-level underground garage containing 366 parking spaces. Parking and loading are accessed from driveways on Broadway and Redpath Avenues.

Site and Surrounding Area

The site is at the southeast corner of Broadway and Redpath Avenues (excluding the very corner property, 93 Broadway Avenue).

The site contains two owner-occupied homes at 95 and 99 Broadway Avenue, which are subject to residential demolition control under the *Planning Act* and a 32-unit, 3-storey rental apartment building at 197 Redpath Avenue, which is subject to Official Plan Policy 3.2.1.6 and Section 111 of the *City of Toronto Act, 2006*, related to rental housing demolition and replacement.

Surrounding uses are as follows:

North: residential uses ranging from single detached houses, to 3-storey apartments buildings, a 10-storey residential building immediately north of the site (across Broadway Avenue) to a 20- storey residential building on the northwest corner of Broadway and Redpath Avenues.

South: immediately south is a 17-storey residential condominium building;

West: a 2-storey detached house at 93 Broadway Avenue which is adjacent to the site and which is not part of this application, a row of single family residential homes at 85 – 91 Broadway Avenue on the opposite (to the site) southwest corner of Broadway and Redpath Avenues and an 8-storey apartment building at 188 Redpath Avenue which is on the west side of Redpath Avenue south of the houses at 85 – 91 Broadway Avenue;

East: immediately to the east of the site are three, 3-storey rental apartment buildings which front onto Broadway Avenue.

The Planning Act

Section 2 (j) of the *Planning Act* lists "the provision of a full range of housing, including affordable housing" as a matter of provincial interest that municipalities shall have regard for when making planning decisions under the *Planning Act*.

Provincial Policy Statement and Provincial Plans

The 2014 Provincial Policy Statement (PPS) provides policy direction on matters of provincial interest related to land use planning and development. These policies support the goal of enhancing the quality of life for all Ontarians. Key policy objectives include: building strong healthy communities; wise use and management of resources and protecting public health and safety.

The recently updated housing policies of the PPS require planning authorities to provide for an appropriate range of housing, including affordable housing, to meet the needs of current and future residents. The PPS recognizes that local context and character is important. The new 2014 PPS, through Policy 1.2.1 h, directs municipalities to address housing needs in accordance with the Ontario Housing Policy Statement (OHPS). The OHPS was introduced as part of the Province's "Long-Term Affordable Housing

Strategy" and is referred to under the *Housing Services Act, 2011*. The *Housing Services Act* states that it is a matter of provincial interest that there be a system of housing and homelessness services. Such a system should among other matters, address the housing needs of individuals and families, and allow for a range of housing options to meet this broad range of needs. The PPS recognizes that local context and character is important. Policies are outcome-oriented, and some policies provide flexibility in their implementation provided that provincial interests are upheld. City Council's planning decisions are required to be consistent with the PPS.

The Growth Plan for the Greater Golden Horseshoe provides a framework for managing growth in the Greater Golden Horseshoe including: directions for where and how to grow; the provision of infrastructure to support growth; and protecting natural systems and cultivating a culture of conservation. City Council's planning decisions are required to conform, or not conflict, with the Growth Plan for the Greater Golden Horseshoe. City Council's planning decisions are required by the *Planning Act*, to conform, or not conflict, with the Growth Plan for the Greater Golden Horseshoe.

Official Plan

Section 3.2.1 Housing Policy

This redevelopment proposal and demolition application is subject to the Official Plan's Housing policies, in particular 3.2.1.6.

Proposals involving the demolition of 6 or more units of rental housing shall not be approved by Council unless all of the rental housing units have rents that exceed mid-range rents at the time of application. Approvals should provide for their replacement with at least the same number, size and type of rental housing units. The rental housing is to be maintained as rental housing with no condominium registration, with rents similar to those in effect at the time the application is made, for a period of at least 10 years. An acceptable tenant relocation and assistance plan is required, addressing: the right to return to occupy one of the replacement units at similar rents; the provision of alternative accommodation; and other assistance to lessen hardship such as the provision of moving allowances both out of the existing building and for tenants who choose to return, a moving in allowance.

Rental Housing Demolition and Conversion By-law

The Rental Housing Demolition and Conversion By-law (885-2007), contained in Chapter 667 of the City's Municipal Code, implements the City's Official Plan policies protecting rental housing. The City's Official Plan protects groups of six or more rental units from demolition. The By-law implements the City's policies protecting rental housing, which include providing and maintaining a full range of housing, within neighbourhoods as well as across the City. The By-law prohibits demolition or conversion of rental housing units without obtaining a permit from the City issued under

Section 111 of the *City of Toronto Act*. Proposals involving the loss of six or more residential units, wherein one or more of the units are rental, require the submission of a Section 111 application. Council may refuse an application, or approve the demolition with conditions that must be satisfied before a demolition permit is issued under the *Building Code Act*.

A related application such as a rezoning triggers the requirement for an application under Chapter 667 for rental demolition or conversion, and typically City Council decides on both applications at the same time. Unlike *Planning Act* applications, decisions made by the City under By-law 885-2007 are not appealable to the OMB. In this case, the development's Zoning By-law amendment will be approved at the Ontario Municipal Board.

Under Section 33 of the *Planning Act* and Municipal Code Chapter 363, Council has the authority to approve or refuse a demolition permit, except in cases where a building permit has been issued to construct a new building. The proposed demolition requires approval under both Section 33 of the *Planning Act* and Section 111 of the *City of Toronto Act*. Section 363-11.1 of the Municipal Code provides for the co-ordination of these two processes. The Chief Building Official may issue one demolition permit for the purposes of Section 33 of the *Planning Act* and Chapter 667 of the Municipal Code.

Site Plan Control

The proposal is subject to Site Plan Control. The applicant has submitted a Site Plan Application (12 197250 STE 22 SA) that is currently under review.

Reasons for Application

A Rental Housing Demolition and Conversion Application under Section 111 of the *City of Toronto Act* (Chapter 667 of the Municipal Code) is required to permit the demolition of the existing residential rental building.

Community Consultation

Chapter 667 requires the City to hold a community consultation meeting to consider matters under the by-law and the impact on tenants prior to the submission of a report to Community Council. Invitations were extended to the affected tenants and other interested parties for a meeting which was held on December 15, 2014 to consider the rental housing issues.

Tenants had multiple concerns regarding the demolition of their homes prior to and during the construction period. A few tenants have had long tenures and are concerned about looking for units on the market within the local area because they depend on many services there. Others have children in the local schools and are concerned about disruption to their eligibility in special programs during displacement and the hardship of moving larger households. Some tenants were concerned with:

- The layouts of the units as a few of the units are smaller than the existing units.
- Storage space and parking arrangements.
- The ensuite laundry should be available to tenants, rather than a communal laundry room.
- The length of the disruption (estimated to be 30 months)
- Adequate notice of demolition
- The maintenance of the building during the period of this application review.

The majority of tenants were satisfied with the size and layouts of the units, the prospect of living in a new building, that notice and moving allowances would be provided and that they would have the right to return to a unit after construction at a rent similar to the one they are currently paying.

Agency Circulation

The application was circulated to all appropriate agencies and City divisions.

COMMENTS

Planning Act and Provincial Policy Statement

The proposal is consistent with the *Planning Act* and the PPS as it provides for the residential intensification of the site with new condominium units while still retaining the valuable housing tenure options represented by the 32 affordable and mid-range rental replacement units.

Rental Housing

The existing rental building is a three-storey, 32 unit walk up apartment building with 4 bachelor, 3 one-bedroom, 3 two-bedroom and 4 three-bedroom units at affordable rents and 18 units at mid-range rents. It is adjacent to two previously owner-occupied houses at 95 and 99 Broadway Avenue. At the writing of this report, all the units were tenanted. The rental building is subject to the *Residential Tenancies Act*, which has notice and compensation provisions for all tenants requested to vacate for demolition.

Replacement Rental Housing

The owner has agreed to replace the 32 existing rental units with 32 new rental units of approximately the same sizes as the existing units. As shown in Table 1, while a few of the units are smaller than the existing units, staff are satisfied that the new units are livable with each unit having adequate living space including in-suite storage and a private balcony. The current tenants were pleased that no units have bedrooms without exterior windows and the three bedrooms have extra closet space as is appropriate for family or room-mate oriented units. The new rental units would be located within the new building on the third and fourth floors with a dedicated laundry room but shared entry and amenity areas with the condominium units that comprise the balance of the building. The rental units will be secured as rental housing for at least twenty years with no application for condominium registration, demolition or for conversion to any non-rental housing purposes during this period.

Staff are satisfied with the revised plans for the replacement units that show the replacement of the existing units at 100% of the total GFA. Through the review process many unit layouts were improved. The Zoning By-law will secure the provision of the units and the Section 37 and Section 111 Agreements will require that the new units be at least 95% of the size of the existing units, to allow flexibility in the construction of the building.

Table 1: Existing vs. Proposed Unit replacement by size and type

Existing				Proposed			
unit #	Type	sq m	balcony	unit #	Type	sq m	difference
3	1 bed	62.8		A	1 bed	62.5	99.52%
4	2 bed	80		A	2 bed	82.9	103.63%
5	1 bed	61.9		C	1 bed	58	93.70%
6	2 bed	80.2		D	2 bed	79.2	98.75%
9	bach	42.8	n/b	A	bach	39.8	92.99%
101	3 bed	99.4		B	3 bed	109.3	109.96%
102	1 bed	58	n/b	F	1 bed	54.5	93.97%
103	1 bed	62.8		B	1 bed	64.2	102.23%
104	2 bed	80		B	2 bed	86	107.50%
105	1 bed	61.9		D	1 bed	65.1	105.17%
106	2 bed	80.2		G	2 bed	83.2	103.74%
107	bach	39.5	n/b	D	bach	37.6	95.19%
108	3 bed	97.7		D	3 bed	101.1	103.48%
109	bach	42.8	n/b	A	bach	39.8	92.99%
201	3 bed	99.4		B	3 bed	109.3	109.96%
202	3 bed	99.5		A	3 bed	106.1	106.63%
203	1 bed	62.8		B	1 bed	62.4	99.36%
204	2 bed	80		C	2 bed	81.5	101.88%
205	1 bed	61.9		D	1 bed	65.1	105.17%
206	2 bed	80.2		E	2 bed	80.7	100.62%
207	bach	39.5	n/b	B	bach	42.4	107.34%
208	3 bed	97.7		F	3 bed	108.7	111.26%
209	bach	42.8	n/b	A	bach	39.8	92.99%
301	3 bed	99.4		C	3 bed	104.7	105.33%
302	3 bed	99.5		A	3 bed	106	106.53%
303	1 bed	62.8		C	1 bed	58	92.36%
304	2 bed	80		D	2 bed	79.2	99.00%
305	1 bed	61.9		E	1 bed	57.3	92.57%
306	2 bed	80.2		F	2 bed	75.8	94.51%
307	bach	39.5	n/b	C	bach	37.4	94.68%
308	3 bed	97.7		E	3 bed	92	94.17%
309	bach	42.8	n/b	A	bach	39.8	92.99%
totals		2277.6				2309.4	100.32%

The Zoning By-law and/or Section 37 Agreement will specify the provision of units that meet the minimum requirements as follows:

- The seven (7) bachelor units shall be not less than 37.4 m² , with five (5) being not less than 39.5 m²;
- The nine (9) one-bedroom units shall be not less than 54 m² , with eight (8) being over 57 m² , and five (5) being not less than 62 m²;
- The eight (8) two-bedroom units shall be not less than 75 m² , with three (3) not less than 79 m² , and one (1) shall be over 85 m²;
- The eight (8) three-bedroom apartments shall be not less than 92 m² , with seven (7) over 100 m² , and three (3) over 105 m²;
- The combined floor areas of the 32 rental replacement units will not be less than 2164 m²;
- There shall be no interior bedrooms for any units, with each of the bedrooms in these 32 units having an exterior, operable window; and
- All the units shall have balconies

The rental housing component is to have 32 associated secure bike lockers and 9 parking spaces with tenants choosing to return having the first choice. For new tenants, the parking rate will be capped at a rate of \$100/space/month in the first year of occupancy. Tenants will have full access to the shared amenity spaces of the building at no extra charge unless pre-booking or if a deposit is required. This is similar to the process required for the condominium portion of the building.

Tenant Relocation and Assistance Plan

The following comprises the proposed assistance package:

- Length of tenancy
 - One year – 5 years = +1 month rent
 - 5 years – 15 years = +2 months' rent
 - 15 years + = +3 months' rent
- A further “rent-gap” compensation for an approximate difference between the rent of the occupied unit and the average market area rent by type for an average vacancy of 30 months for the expected length of construction to aid with hardship. The average market rents will be calculated by the area bounded by Sherwood Avenue in the north, Duplex Avenue on the west, Soudan Avenue on the south and Foman Avenue in the east. Condominium units are allowed to be discounted from the calculation.

The proposed Tenant Relocation and Assistance Plan goes beyond the minimum requirements of the *Residential Tenancies Act* by increasing the 4 month notice period for tenants to vacate to 5 months, and by providing additional financial assistance beyond the *Residential Tenancies Act* required payment equal to 3 months rent for eligible tenants. This includes moving allowances, extra compensation on a sliding scale based on length of tenancy, a 'rent-gap compensation' and special assistance for tenants deemed to have special needs. Tenants with dependant family members who have location-based services are to be considered special needs in this development. Eligible tenants will have the right to return to a similar rental unit in the new building, at rents similar to those paid in their existing apartment.

Rent Provisions

The 14 affordable rental units and 18 mid-range rental units will have rents secured according to the City's standard practices. Rents for tenants moving in during the first 10 years shall be no higher than the CMHC average market rent in the case of affordable rents, and no more than 1.5 times average market rent for the mid-range units. For returning tenants, the initial rents will not exceed the mid-range rent limits and will be based on their last rent paid with permitted annual rent guideline increases that would have otherwise occurred during the intervening period until the building is available for move-in, and a 4% increase representing a new building allowance.

Annual increases are limited to the provincial rent guideline increase, and above-guideline increases if applicable, during this first 10 year period. For any tenant who remains after the tenth year, these protections will continue until the earlier of when they move out or the 20th year of the new building's occupancy, followed by a 3 year phase in to unrestricted market rent. Commencing in the 11th year, any new tenants may be charged unrestricted market rents.

Conclusion

The replacement proposal, including the proposed Tenant Relocation and Assistance Plan, meets the applicable Official Plan policies and is consistent with the City's standard practices for rental replacement. The Draft Zoning By-law Amendment provides for securing these matters in a Section 37 Agreement. The final order of the Ontario Municipal Board approving the proposed development has been withheld until such time as the form of the Zoning By-law Amendment has been finalized and a Section 37 Agreement with provision for the rental housing replacement has been entered into.

Staff are recommending that Council approve the demolition of 32 residential rental units conditional on the applicant providing the replacement rental housing and tenant relocation assistance as outlined in this report, and entering a into Section 111 Agreement to the satisfaction of the Chief Planner and Executive Director, City Planning to secure these conditions consistent with the provisions of the Draft Zoning By-law Amendment to be approved by the Ontario Municipal Board.

CONTACT

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SIGNATURE

Gregg Lintern, MCIP, RPP
Director, Community Planning
Toronto East York District

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ATTACHMENTS

Attachment 1: OMB Decision
Attachment 2: Draft Zoning By-law Amendment

Attachment 1: OMB Decision

Ontario Municipal Board
Commission des affaires municipales
de l'Ontario



ISSUE DATE: June 19, 2014

CASE NO(S): MM130048

Applicant and Appellant:	Sentinel (Broadway) Holdings Inc.
Subject:	Amendment to Zoning By-law No.438-86, as amended Failure of the City of Toronto to announce a decision on the application Subsection 34(11) of the <i>Planning Act</i> , R.S.O. 1990, c. P. 13, as amended
Legislative Authority:	R2 Z2.0
Existing Zoning:	Site Specific (To be determined)
Proposed Zoning:	To permit two 30-storey residential towers on top of an 8-storey podium
Purpose:	95 & 99 Broadway Avenue and 197 Redpath Avenue
Property Address/Description:	City of Toronto
Municipality:	MM130048
OMB Case No.:	PL130547
OMB File No.:	
Referred by:	Sentinel (Broadway) Holdings Inc.
Subject:	Site Plan
Legislative Authority:	Subsection 41(12) of the <i>Planning Act</i> , R.S.O. 1990, c. P.13, as amended
Property Address/Description:	95 & 99 Broadway Avenue and 197 Redpath Avenue
Municipality:	City of Toronto
OMB Case No.:	MM130048
OMB File No.:	MM130048

APPEARANCES:

Parties

City of Toronto

Sentinel Broadway Holdings Inc.

Sherwood Park Residents'
Association

Counsel[±]/Representative

Amanda Hill[±]
B. O'Callaghan[±]

Adam Brown[±]
Jessica Smuskowitz[±]

M. Rubenstein
B. Daube

Participants:

Magaret Healey
Diane Lohnes
Dean Roger
Helen Riley
Will Poppe
Malcolm Martini
Terry Mills

HEARING EVENT INFORMATION:

Hearing:

Held in Toronto, Ontario on February 24 to 26,
2014

DECISION DELIVERED BY S. WILSON LEE

[1] The Yonge-Eglinton Centre is a vibrant urban node in North Toronto. Bustling with verve and energy, it is endowed with a wide-range of uses in its fabrics, including office, retail-commercial, entertainment, residential and institutional uses. Within its midst, there are point towers co-existing in amity and close contact with buildings of wide-ranging vintages and architectural forms. There is no question that the area is undergoing a transformation of a sort as applications for development abound. There is also little doubt that such a transformation would not have been possible had it not been for the number of epoch-making and enabling policy instruments enacted and promulgated within the last decade by the Province and the City of Toronto.

[2] This hearing relates to an application for rezoning launched by Sentinel (Broadway) Holdings Inc. for a site of 2,983 square metres (“sq m”) with frontages of 36.2 metres (“m”) along Broadway Avenue and 41.4 m along Redpath Avenue. The application was submitted to the City in March 2012. In May 2013, an appeal was launched to the Board. In December 2013, a “With Prejudice” settlement offer was submitted to the City based on a revised plan proposing a reduction in height from 38 to 34 storeys for the residential towers and from eight storeys to seven storeys on the podium and a reduction of density from 22 FSI to 18.8 FSI. This hearing is based on the revised plan.

[3] At the commencement of the hearing, the Board was advised that the transportation issues have been removed, leaving only the planning matters for adjudication. In addition, the Board was advised by counsel for the City that the proposed height would not be a matter of dispute. On the second day of the hearing, counsel for the City further advised that the parking issue was withdrawn as the parties had come to a mutually acceptable parking ratio.

[4] The Board heard conflicting evidence from both the applicant and the City in the area of land use and urban design. The applicant also proffered some transportation evidence albeit cut short because of the vanishing parking issue. A number of area residents gave evidence to the Board as well.

[5] In the end, this hearing is focused on the opinions arising from the interpretation of the Growth Plan, sections of the Official Plan, the Yonge-Eglinton Secondary Plan, Council-approved guidelines such as the Tall Building Design Guidelines. The issues between the City and the applicant are nuanced. Neither side disputes that substantial residential growth on this site is appropriate and timely. Neither disputes the urgency and pre-eminence of the higher-order planning documents. Nonetheless, there is a divergence of opinions as to the exact and appropriate density and built-form that can legitimately materialize on this site within the policy context delineated above. It is to these questions the Board will next turn our analysis.

THE LARGER PLANNING CONTEXT

[6] The subject site is located within the Yonge-Eglinton “urban growth centre” and two “major transit station areas” pursuant to the Growth Plan. The site is also located within the Yonge-Eglinton Centre “anchor mobility hub” under the Big Move --Transforming Transportation in the Greater Toronto and Hamilton Areas (“RTP”), a statutory provincial policy document passed under the *Metrolinx Act*. Each of these designations has significant planning meaning in a specific and larger context.

[7] What must be pointed out, at the outset, is the potent and binding nature of the Provincial Plans. The Board doesn’t only mean that decision-maker cannot readily ignore the fact that the Growth Plan and the RTP act as mandatory guides to planning and development. That much is never in doubt. Provincial Plans bind decision makers not only in the larger sphere of rule-making, such as the design of a master planning document or a comprehensive zoning by-law. They bind them also in this following sense: these Plans are both *omnipotent* and *omnipresent*. Section 3(5) of the *Planning Act* ensures that every time a decision is made, whether it is by a municipality, a local board, the Minister of the Crown, or, indeed the Board, the concern of conformity to the provincial plans is ever-urgent and ever-present. Such mandatory conformity applies, irrespective whether it is a minor or major event, as long as it affects a planning matter.

[8] Under the Growth Plan, “urban growth centres” are planned to achieve, by 2031 or earlier a minimum gross density target of 400 residents and jobs combined per hectare for each of the five “urban growth centres” for Toronto. The “major transit station area” is an area including and around any existing or planned higher order transit area within an approximately 500 m radius of a transit station. The subject site is within 500 m from the Eglinton Station and 300 m from the Mount Pleasant intersection which is the future location of a new underground, on the Eglinton-Scarborough Crosstown LRT that is now under construction.

[9] Since one of the questions at this hearing concerns density, it is noteworthy that the target density for the urban growth centre is a minimum. The Growth Plan does not set up a maximum. Furthermore, under s. 2.2.4 paragraph 6 of the Growth Plan, if an “urban growth centre” has planned for or has achieved

beyond the minimum density target, the higher density will be considered the minimum. In other words, the ceiling will become the floor.

[10] In addition, the site is within an “anchor mobility hub” under the RTP. This and other anchor mobility hubs coincide with the urban growth centres and significant major transit stations identified in the Growth Plan. The RTP considers the area within an 800-m radius of the transit station as part of the Hub and these areas are to achieve a minimum density of approximately 10,000 people and jobs.

[11] Based on the foregoing, the Board finds that the subject site is a candidate within the intensification area of the Growth Plan. The two designations in the Growth Plan, both applicable to this site, enable, encourage and, in fact, call for major growth for population and employment. Underlying these directives are the express policy thrusts of the Growth Plan that new growth for housings and employment must take place in areas that can optimise existing infrastructures; invest and support the uses of transit as well as providing for a focus to attract provincial, national or international employments. The underlying vision is that such policy thrusts would eventually lead to the building of prosperous, healthy, compact, vibrant and complete communities.

[12] The Board also finds that the site is well-positioned to help implement the policy objectives of the RTP which would optimise and support transit, pedestrian walking, cycling and a transit-supportive, compact community. As the Board has noted above, this is a site that is in close proximity to a significant convergence of higher order transit, including the Yonge subway line, the future Mount Pleasant LRT station on the Eglinton-Scarborough Crosstown LRT that is currently under construction. Albeit a peripheral point, the site is well served by the surface transit as well. The site is within walking distance to busing routes on Eglinton Avenue and Mount Pleasant Avenue, which are major connectors. Eglinton Subway Station itself is a major bus station. There are sparse and occasional bus services along Redpath Avenue: 4 in the a.m. peak and 2 at the p.m. peak.

THE OVERVIEW OF THE RELEVANT QUESTIONS

[13] At this point, it is fitting for the Board to address the localised planning issues. The planning issues can be broken into two components. First, does the proposed height, density and scale constitute or result in an unacceptable burden on the existing and future infrastructure or other municipal and public services? Secondly, are the proposed height, density and scale permitted under the City's Official Plan and the Secondary Plan? As a subset of the second question, do the resultant mass and bulk as well as the presentation of the proposal, deriving from the height and density, fit with the public realm? Do they constitute a good urban design and in compliance with the Urban Design Guidelines?

[14] Messrs. Peter Walker, and Tim Burkholder, giving planning evidence on behalf of their respective clients, manifest a subtle but distinct difference on many aspects of all these questions above. Their differential evidence is augmented by Ms. Anne McIlroy and Ms. Rong Yu, who testified respectively and exclusively on the question of urban design.

[15] With respect to the first question, the Board understands that, among others, a functional servicing report, a traffic impact and parking study, a shadow study, a microclimatic analysis and urban design brief, a planning rationale report, a community services and facilities study and a housing issues report have been filed with the City. For our purposes, there is nothing by way of evidence presented at the hearing indicating any unacceptable impact on infrastructure, both hard and soft. There has not been submission made that the density should be rejected based on any such concerns.

THE MORE LOCALISED PLANNING CONTEXT

[16] The Board will now address the first subset of the second question. Accordingly, an analysis of the relevant sections of Official Plans and Secondary Plan is in order.

[17] As a preliminary, it is trite but essential to state that the Board, must, in the interpretation of the Official Plan policies, eschew an approach that is narrow, fastidious or unduly legalistic. Instead, it should be guided by a contextual and purposive approach, with a view of furthering the overall policy objectives of the

Plan. In *Bele Himmel Investments Ltd. v. Mississauga (City)* (1982), 13 O.M.B.R. 17 (Div. Ct.) the following oft-cited relevant dicta enunciated by the court is applicable and bears a timely re-emphasis:

Official plans are not statutes and should not be construed as such. In growing communities such as Mississauga, official plans set out the present policy of the community concerning its future physical, social and economic development. In such a document there will almost inevitably be inconsistencies and uncertainties when considered in light of a specific proposal. It is the function of the Board in the course of considering whether to approve a by-law to make sure that it conforms with the official plan. In doing so, the Board should give to the official plan a broad liberal interpretation with a view to furthering its policy objectives. There was, in this case, an adequate basis for a finding by the Board that Amendment 160 applied to the Subject Lands and that the by-law conformed. In my opinion, it cannot be said that the Board erred in law in making its decision.

[18] The thesis of the evidence of the planner for the City, Mr. Burkholder, is that although density and height requirements have not been delineated at the Official Plan or at the Secondary Plan, at 18.8 FSI, the density cannot be regarded acceptable even though the proposed height of 34 storeys, in his view, can. Pursuant to s. 5.2 of the Yonge-Eglinton Secondary Plan, his view is that the highest heights, densities and scale of developments are to be assigned to the four quadrants of the intersections. The subject site, which is at Broadway and Redpath Avenues, is expected to have lower density.

[19] Furthermore, he maintains that pursuant to s. 5.3 of the Secondary Plan, there must be a decrease of heights and densities easterly from the intersection of Yonge Street to Mount Pleasant Avenue along Eglinton Avenue. The proposed development density, in his opinions, simply does not fit with this pattern. As a result of such an analysis, he concludes, that an Official Plan Amendment is called for.

[20] These opinions of Mr. Burkholder raise implications far more labyrinthine than at first blush. In the absence of heights and densities being delineated in either the Official Plan or the Secondary Plan, how should height, density and scale of development be evaluated? How does one do a proper comparison of heights and densities for the subject site with the sites at the four quadrants? Is it on a site by site basis? Or is it on the basis of the districts as a whole? Is there a transition required and how and what does it entail?

Does the acceptance of a certain height by the City influence the amount of density to be assigned? The Board has pondered on these questions in our deliberations before coming to our final conclusions. Our findings are set out as follows

[21] Firstly, the Board finds that the subject site is strategically located. It is situated at the designated *Apartment Neighbourhood* area within the Yonge-Eglinton Centre. The Board is keenly aware that under s. 5.2 of the Secondary Plan, the highest heights, densities and scale of development will be within the Mixed Use Area “A” on the blocks of the four quadrants of the intersection of Yonge and Eglinton Avenues. However, there are the following considerations relevant to the subject site. Under s. 2.7(e) of the Secondary Plan, there is a specific policy that directs “higher density residential development proposals within the *Apartment Neighbourhoods* to sites with nearby subway station access.” As noted in our previous analysis, the site is within 500 m to the Eglinton Subway Station entrance and 300 m from the future Mount Pleasant LRT station. It is therefore our conclusion that higher residential densities are being planned for and directed by the Secondary Plan for sites such as the subject site because they meet the qualifications handsomely.

[22] Secondly, the site is strategically located in another sense. It is centrally located at the *Apartment Neighbourhood* area. It is not at the edge of its district and is not approximate to any low rise *Neighbourhoods* districts which may attract concerns of transition, overshadowing or interfacing. Mr. Walker in both his written and *viva voce* evidence has highlighted this aspect. Mr. Burkholder, in contrast, has not commented on this feature. His notion of transition that there ought to be a scaling down of height, density and scale in an easterly direction is based on his reading of s. 5.3 of the Secondary Plan only. His appears to gloss over two other contextual considerations. The first contextual consideration is that s. 5.3 of the Secondary Plan relates to the scaling down along Eglinton Avenue. It should not affect the district’s core. More importantly, even if the Board is wrong on this point, s. 5.4 specifically indicates that development in “these *Apartment Neighbourhoods* will comply with policies of the Official Plan, particularly the policies in sections 2.3.1 and 4.2.”

[23] The second contextual consideration is that there are provisions in s. 4.2 of the Official Plan addressing criteria of development in *Apartment Neighbourhoods*. They affirm precisely and unambiguously that there may be transition requirements to adjacent low rise *Neighbourhoods* areas. Nothing in these policies of the Official Plan requires a transition within the *Apartment Neighbourhood* itself. In other words, the transition is between areas. It is not a linear gradation within the *Apartment Neighbourhood* designated area.

[24] This same point has been re-iterated in other provisions of the Official Plan. Section 2.3 paragraph 6(f) indicates that transition is to be done at the boundary points. Such a provision is specific enough to constitute reinforcement for the interpretation Mr. Walker has urged the Board to adopt. In short, the Board is satisfied that what needs to be protected for transition are the edges to the abutting low-rise *Neighbourhood*.

[25] Thirdly, even if one were to make a comparison based on a crude numerical strength, the height and density on the subject site do not threaten the status of the four quadrants as being the locations for the highest height and density. The recently approved E-Condo in Area "A" is at 58 storeys and 36 storeys at 15 FSI. Minto Midtown, built before the conception of the Growth Plan is at 58 storeys and 36 storeys with a density of 12 FSI. The planned development at the S.W. corner of Yonge and Eglinton is at 40 storeys and 9 FSI. Albeit not in full measures, the Board generally subscribes to Mr. Walker's assertion that given that numerical density targets are not provided for in the Official Plan, the deference by the Official Plan to a set of built form policies out of which density number is derived is sensible. In the inimical aphorism of Mr. Walker, density is a figure that falls out of design, as opposed to being a factor that drives design.

[26] Finally, one must not lose sight of the fact that this is an area in rapid evolution in a milieu that no density targets have been set legally. An artificially chosen density figure under such a regime is, at best, a transient benchmark. At worst, such a density target can be ill-chosen. It is far more appropriate to assess the proposal through the lens of effective OP policies, urban design principles than an arbitrarily chosen target. In our view, a qualitative calibration as opposed to an unquestioning quantitative approach is infinitely preferable.

[27] Based on the above, the Board finds that at 34 storeys and 18.8 FSI, the proposal will not distract, but will instead maintain the status of the Yonge-Eglinton intersection as the locations for the highest heights, densities and scale of development. The Board is also satisfied that the proposal will adhere to the spirits and letters of the Official Plan and Secondary Plans. No Official Plan amendment is needed.

THE URBAN DESIGNS AND THE BUILT FORMS

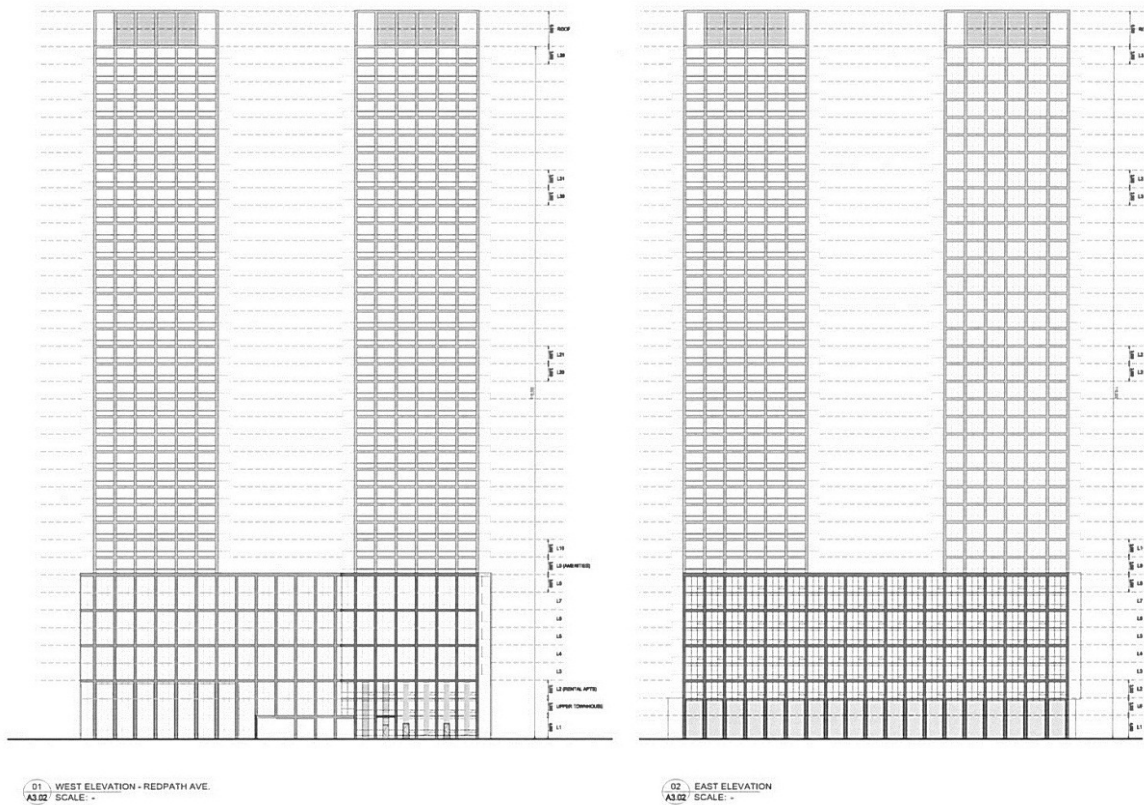
[28] Let us now turn to the question of urban designs, which is the second subset of the second planning question. The proposal has a mix of unit types that are quite diverse. It consists of a seven storey-podium with two - 27 storey towers above. The two towers have a pattern of horizontal and vertical bays, which are designed to mitigate the wider tower facades. At Level 8, there is a large outdoor amenity area, with a pool, landscaping, seating and special paving. The two towers are separated by 20 m. A narrower floor plate at Level 8 helps to differentiate the building base from the top. The proposed building has a strong grid-like character extending from the at-grade townhouses units and podium through the towers. It is a modernist architectural specimen, with two highly glazed towers: symmetrical, sleek, with a flourish that is quietly stylish.

[29] The Design Criteria for Tall Buildings & the Tall Building Design Guidelines (2006 & 2013 versions) have some important features that no designer ought to ignore or dismiss. Nonetheless, even if one were to apply the Official Plan Policy, under s. 5.3.2.8, 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. 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.

[30] Unlike the planning evidence of Messrs. Walker and Burkholder, the urban design evidence proffered to the Board at this hearing gives an impression that the two witnesses speak different languages. The urban designer for the applicant applies unfailingly the Official Plan Built Form Policies.

[31] She also applies the Council approved Guidelines with a strong visual and contextual perspective. On the other hand, the approach of the urban designer for the City is textual only as she peers scantily into any other relevant realms. Her evidence is punctilious to a fault and like Churchill's pudding, it lacks a theme.

[32] Take the podium design. The City's urban designer complains that most of the tower frontage on Broadway Avenue has no step-backs from the podium. It is therefore her contention that it is non-compliant. What is noticeable is that she follows slavishly conventional wisdom to the point that architectural innovations are considered anathema. In this case, the proposed development consists of two towers, oriented with their lengths running east-west. The towers are slightly set back from the podium, about 1.0 to 3.5 m, creating a "reveal", which allows a differentiation between the base and the middle. The following graphics demonstrates both the east and west elevations how a clearly defined base and top can be done through the "reveal" without the pronounced setbacks. These distinct definitions will be more subtly noted when the lights inside the buildings brighten the glazed façade.



[33] There is the question involving the landscaped open space at the grade level. The City’s urban designer points out that although the total boulevard width from the curb to the wall at grade meets the minimum Tall Building Guidelines, the latter would not countenance cantilevering the building and balconies from the second floor up to cover more than 80% of the proposed landscaped open space.

[34] Such critique misses the mark that the base of the building is designed to frame the streetscape on Broadway Avenue and Redpath Avenue. It is also meant to animate the streets, with wide sidewalks, landscaping, seating, private trees as well as at grade entrances for the townhouse units. The point raised against cantilevering misses the importance of bringing the private realm closer to the public realm as “eyes on the streets”. There is enough setback from the building phase to accommodate private trees and landscaping as well as a 3.0-m pedestrian walkways on both streets. In our view, to revive the notion of the “tower in the park” in an “Urban Growth Centre” is not just an anachronism, it is a mistake.

The City's witness also ignores the larger trend of making the ongoing evolution of Yonge-Eglinton Centre as a vibrant, compact and complete community. Section 3.2.1 of the Official Plan setting out the requisite Built-Form policies has the following passage that is highly relevant:

New development will be located and organised to fit with its existing and/or planned context. It will frame and support adjacent streets, parks and open spaces to improve the safety, pedestrian interests and casual view to those spaces from the development”

[35] Then, there are concerns expressed relating to the separation distance, to the 17 storeys building to the south, which is 15.4 m and the proposed separation distance between the two towers, which is 20 m. The Board has reviewed an abundance of visual documents from both sides, including computer-generated photos delineating building relations, site plans showing the footprints of buildings, computer-generated aerial views at different vantage points as well as a variety of simulated views within the immediate neighbourhood and beyond. Our assessment is based on a fairly accurate notion what the fabric will look like after the building is constructed.

[36] We are satisfied that these separation distances, both between the towers and to the building to the south are adequate and fitting. Neither should constitute any serious concern relating to light, view and privacy. The distance between the proposed complexes on the subject site to the apartment building to the south is acceptable not just because the proposed building is slightly offset. The proposal faces this building not to their living rooms face which looks onto the street. More importantly, the owner and none of the tenants at that building have come forward to voice their concerns. The concerns raised by the City are based on a strict textual analysis, lacking the immediacy, intimacy and authenticity of a visual, contextual and ambience approach.

All of the foregoing is a testament that the proposed development represents good urban designs. However, it must not be overlooked that there are key elements of the design that address and comply with the Guidelines. For instance, the placement and the east-west orientation of the towers have been considered to minimize the shadow impacts on the streetscape. The towers are slightly offset, thereby improving the shadow impacts.

Shadows are contained within the *Apartment Neighbourhood*, with minimum on the adjacent low rise *Neighbourhood* and none on parks or open spaces.

[37] The site access, servicing and parking will be located internally in the buildings, all of which would be coordinated via common access points. The reorganization will appeal to the Guidelines in more than one aspect. In addition, the urban designer for the applicant enumerates other such instances in her evidence with respect to the architectural mass, which is duly noted by the Board.

[38] The Board is also impressed with the high quality of the planned streetscape for this project, which not only pay homage to, but comply with the Guideline provisions on streetscape and side walk zone. More importantly, the design of accommodating the bicycle racks inside the proposed complex will be infinitely superior to the conventional accommodation at the street level. Given the amount of bicycles to be accommodated, the latter approach, if chosen, will simply mar the quality of the streetscape as well as posing a jarring effect to the animus of street life.

THE NEIGHBOURING RATEPAYERS' CONCERNS

[39] The Board has heard testimony given by a number of neighbours. Their overriding concern is that there would be more and more inhabitants as a result of the development, with the accompanying effects of greater pedestrian and vehicular traffic and the possible impact to the quality of living.

[40] The Board is sensitive to the misgivings from the residents. However, this vicinity is in rapid evolution and is driven in part by the planning instruments promulgated by both levels of governments. As indicated in our prior analysis, the changes are not only planned for but are within the parameters of acceptance. There is no indication that the area in question is currently in need of any special needs or services, additional to those normally available to those in an established area. Mr. Walker testified that the area in question contains a relatively young and affluent demographical group that lives alone, with children and seniors comprising a smaller percentage as compared to the City as a whole.

[41] Take another source of concern which relates to a peaked vehicular and pedestrian traffic. The City transportation team has not raised any concerns and has in fact, relinquished the earlier requirement for more indoor parking. One must not lose sight of the fact that a service-rich, transit-rich and highly urbanised area as this area does possess certain inalienable features that appear to be overcrowding.

[42] There would be undoubtedly more residents to come. In fact, residents and transit, in financial planning terms, have a relationship that is symbiotic, reciprocal and mutually re-enforcing. Transit needs users as users require transit. The current high (78%) non-auto modes share of transportation for this area is a testament of what the future may behold. In fact, what we will witness and what is anticipated is a gradual metamorphosis and materialisation of this area into an Urban Growth Centre with all its glory, its earthy pace, its fast rhythm, its hustle and bustle.

SHOULD SECTION 37 PAYMENTS BE ADJUDICATED BY THE BOARD?

[43] One of the issues raised at this hearing is the s. 37 payment. Counsel for the City, Mr. O'Callaghan asks the Board not to make any definitive rulings at this stage but simply gives the parties opportunity to negotiate once the approved height and density are known. In the event that the parties are unsuccessful at the negotiations, Mr. O'Callaghan would then argue before the Board. Mr. Brown opposed this approach vehemently. He submits that there are issues identified on the issues list relating to these questions. He submits that both on grounds of legality and merits, the Board should simply reject the request of the City. Very extensive arguments have been rendered by Mr. Brown. He also urges the Board not to allow Mr. O'Callaghan to split his case.

[44] In short, there are two preliminary matters relating to issues of s. 37. The first is whether the Board should accede to the City's request not to make any findings on the merits of the contribution at this time. The second is whether the Board is within its legal right to enunciate any findings on the merits. In other words, the question is whether the Board is legally empowered to adjudicate if the parties agree to disagree. The Board finds that it agrees with Mr. Brown on the first question and Mr. O'Callaghan on the second.

[45] The Board is mindful of the pitfalls of splitting the case. These issues concerning the s. 37 issues have been identified in the issues list and the Board expects the parties to be ready to put forward its case on the days scheduled. Furthermore, there are substantial references made respecting these issues in the witness statements filed by both the applicant and the City. Both Mr. Walker and Mr. Burkholder delineated their substantial evidence in their written statements. They form the record for this panel to make findings. There may be voids. There may be some nuanced matters that need to be subsequently fine-tuned as may be directed by the Board. However, there is no reason why the large questions should not be addressed at present. As such, the Board will address these issues as much as we can, on the basis of what have been submitted orally and in written form.

[46] Let us turn to the second preliminary issue. The Board has heard arguments in relation to our authority to address the s. 37 matter. Issue 18 of the Procedural Order in fact addresses this question of legality. On one hand, it is submitted by Mr. O'Callaghan that the Board has the jurisdiction, authority, as well as ample precedents, to impose an amount if the parties were unable to agree. On the other hand, Mr. Brown rejects the proposition that the Board has any authority to order a s. 37 payment. The *Planning Act* contemplates an agreement between the owner and the authority. In his view, if there is no agreement, nothing can be imposed. Mr. Brown further questions the appropriateness of an imposition for this case. He questions that there is a lack of "nexus" between the proposal and the benefits the imposition are purported to endow.

[47] Section 37 of the *Planning Act* states:

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.

Condition

(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.

Agreements

(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.

[48] The Board notes, as this panel has pointed out at the hearing, that there is no statutory provision or, indeed, any known precedents for matters of the bonus by-law to be appealed to the Board on a *stand-alone* basis. There is no expressed authority in s. 37 of the *Planning Act* that sets out rights of appeals or the Board's authority to impose if there is a disagreement. Almost all the precedents relating to s.37 matters are in conjunction with appeals to the official plans and/or by-laws. When pressed by this panel on this point, Mr. O'Callaghan indicated the reason for such a phenomenon is that s.37 is essentially part of the s. 34 power of the *Planning Act*.

[49] Improvised as Mr. O'Callaghan's on-the spot argument may be, it is not without merits. If a bonus matter can be part of a zoning by-law passed under s. 34, a part of it is appealable insofar as and inasmuch as the by-law is appealable. In this panel's view, if payment pursuant to s. 37 can be included in a zoning by-law, it is part of the by-law or can be construed as a condition of the by-law. As such, it is appealable and therefore can be adjudicated by the Board.

[50] There is no doubt that because of the language in s.37, the consent of the parties should always be the first choice. However, In this case, Mr. Brown has indicated that his client is unwilling to agree. He indicated to the Board emphatically at the hearing.

[51] There are many past precedents where the Board has acceded to the request to adjudicate matters of s. 37 as part of the appeal to Official Plans and/or zoning by-laws. The Board did it primarily because it is expedient to resolve every aspect of the dispute. The legal base for such requests may appear to be slender, but nonetheless alive. Upon this panel's studied reflection, we find Mr. O'Callaghan's position tenable. In addition, this panel takes a rather pragmatic view.

An approach to having all the disputed matters resolved is infinitely preferable to having an unresolved s. 37 matter overhanging or holding up the planning instruments that have merits. The Board is also mindful that it has the broad jurisdiction under s. 88 of the *Ontario Municipal Board Act* to lend a helping hand to parties for a proper closure. In conclusion, the legal base may be narrow, but it does exist.

HOW APPROPRIATE ARE THE REQUESTED ITEMS?

[52] A proposed project such as this will attract a number of municipal charges. There will be development charges, which are charges arising from increased capital costs required because of the increased needs for services arising from developments. These will arise from the by-law passed under the *Development Charges Act.*, S.O. 1997; Ch. 27. These will be tied to the number and type of units, or GFA or any quantifiable formula. There will be the park lands requirements either in the form of land conveyances or cash-in-lieu pursuant to s. 51.1 of the *Planning Act*. The quantum of development charges and cash-in-lieu will undoubtedly reflect the magnitude and size of the project.

[53] The universe of s. 37 is quite different from those of the development charges and park levies. Development charges reside in a statutory framework with rules pertaining to both processes and substances, so that it is possible to ascertain the items and quantum that can be charged after a due process of studies and appeals. A little less so, park levies are subject to similar constraints, albeit there are areas of uncertainty that require elucidation at the Board and the Courts in due course. Section 37 bonus charges possess less precision and more uncertainty than these. As disagreements mount, the Board has been increasingly drawn into the orbit of adjudication and is compelled to craft rules in terms of fixed rules in the Official Plan, nexus and justification of quantum, all of which are reflected in a number of decisions rendered in the past.

[54] Let us address now the itemisation and quantum problem of the s.37 matters in this case.

[55] Firstly, the requirement to include a full replacement of the existing 32 rental units and a tenant relocation and assistance plan as part of the s. 37 contribution is accepted by the Board and, as such, it should be included in the contribution.

[56] Secondly, the Board has misgivings with the overall quantum approach enunciated by Mr. Burkholder in paragraph 81 of his witness statement. Using the range of the amounts of the eight recent developments in the area where the parties have agreed on the contribution to s. 37 payments and deriving from it an average of 10% of value of the over-density GFA, he proposes a figure for contribution.

[57] The flaws of such an approach has been highlighted by the Board in *Baywood Homes v. City of Toronto* (Board File No.: PL080993), a decision rendered by Mr. Makuch which stands for the proposition that such an important calculation or the underlying approach of the calculation is not grounded on any specific Official Plan policy, and that it offends a line of OMB decision that requires specific, fair, transparent and predictable requirements. Using eight other contributions from 5.4% to 22% to derive a 10% over-density contribution, the approach does not strike one as attaining the height of analytical sophistication. Furthermore, the baseline for the calculation of the density increase is not ascertained at all. If it has been considered, it isn't apparent. There is also Policy 5.4 which may give an exemption of 10,000 sq m. None of these features seem to have been taken into account.

[58] Thirdly, in this case, there are two items of contribution suggested, the streetscape improvement in the Yonge-Eglinton area and the acquisition and construction of the new park on the site of the TTC bus barn at Yonge and Eglinton.

[59] The Board does not have any evidence to make any finding on the item relating to streetscape as to whether it should be included and if included, how is it to be quantified or allocated. The Board has not been presented any evidence or arguments as to its nexus, viability or reasonableness.

[60] As for the TTC bus barn measure, it came under a withering attack by Mr. Brown at the hearing, particularly in his cross-examination of Mr. Burkholder. It is the position of Mr. Brown that the idea of this particular site being earmarked for a park is untenable and unrealistic. In his view, the idea has not left the conception stage. There is no quantification of the market value of this site, its air-rights and no assessment of its viability for anyone to take the idea seriously. The Board agrees that the nexus of this matter is doubtful, and should not be a consideration for contribution. If there is a nexus, the Board is also left with no idea as to whether the park levy by way of cash-in-lieu in this case would defray some of the capital cost of the local park.

[61] In summary, the Board has made the following findings.

[62] The overall quantum approach enunciated in the witness statement of Mr. Burkholder of the City is unacceptable.

[63] In this case, the items of capital works, services and matters that should be ascertained in the neighbourhood in question and whether they are quantifiable and have a nexus relating to the development are determined as follows:

1. The full replacement of the 32 rental units and a tenant relocation and assistance plan should be included in the contribution.
2. Given the circumstances of this case, the contribution to the TTC bus barn as a local park has not been established in this case. The Board is careful to note that the justification has not been demonstrated in this case only.
3. As for the streetscape contribution, the Board is left with little evidence to make any determination and the parties should negotiate on this item on their own.

[64] The Board will withhold the final order for the by-law in abeyance for a period of two months. This will enable the final format for this by-law to be crafted on consent. The parties should use the time to finalise the s. 37 matter, including the s. 37 agreement and continue to negotiate on the matter of the streetscape.

[65] In order that the final negotiation can be a success, the Board suggests the following should be borne in mind:

1. The leads for the parties' negotiation must be Messrs.' Brown and O'Callaghan. They are well aware of the nuances of both the evidence and the submissions presented at the hearing.
2. Both parties should be guided by this panel's findings. Mr. O'Callaghan undoubtedly is aware of the applicable law and evidence; and Mr. Brown should value the importance of finality for his client. In planning as in life, both should realize that the road to success is paved less with hard-driven positions than with the hard cobbles of realism.

DISPOSITION

[66] The Board will allow the appeal and amend the by-law in accordance with the height of 34 storeys for the two residential towers and seven storeys of a podium with density of 18.8 FSI. The complex should be in substantive accord with what has been presented to the Board at the hearing.

[67] The Board will issue the requisite order once the final format of the by-law is agreed to. The Board anticipates the parties will come to a final agreement with respect to the s. 37 matter. Two months from the issuance of this Decision will be the timeline for the issuance of the Order.

"S. Wilson Lee"

S. WILSON LEE
ASSOCIATE CHAIR

Ontario Municipal Board

A constituent tribunal of Environment and Land Tribunals Ontario
Website: www.elfto.gov.on.ca Telephone: 416-212-6349 Toll Free: 1-866-448-2248

Attachment 2 – Draft Zoning By-law Amendment

Authority: Ontario Municipal Board Decision issued on June 19, 2014, and Order issued , 2015, in Board File No. PL130547.

CITY OF TORONTO BY-LAW No. XXX-2015 (OMB)

To amend the General Zoning By-law No. 438-86, as amended, for the former City of Toronto with respect to the lands known as 95 and 99 Broadway Avenue and 197 Redpath Avenue

Whereas the Ontario Municipal Board Decision, by its Decision issued on June 19, 2014, and Order issued _____, 2015, in Board File No. PL130547 approved amendments to the former City of Toronto Zoning By-law No. 438-86, as amended, with respect to the lands;

Whereas the Official Plan for the City of Toronto contains such provisions relating to the authorization of increases in height and density of development;

Whereas pursuant to Section 37 of the *Planning Act*, a by-law under Section 34 of the *Planning Act*, may authorize increases in the height or density of development beyond those otherwise permitted by the by-law and that will be permitted in return for the provision of such facilities, services or matters as are set out in the by-law;

Whereas subsection 37(3) of the *Planning Act* provides that where an owner of land elects to provide facilities, services and matters in return for an increase in the height or density of development, a municipality may require the owner to enter into one or more agreements with the municipality dealing with the facilities, services and matters;

Whereas the owner of the aforesaid lands has elected to provide the facilities, services and matters hereinafter set out; and

Whereas the increase in height and density permitted beyond that otherwise permitted on the aforesaid lands by By-law 438-86, as amended, is permitted in return for the provision of the facilities, services and matters set out in the By-law which is secured by one or more agreements between the owner of the land and the City of Toronto.

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

1. None of the provisions of Sections 2 with respect to “*bicycle parking space*”, “*bicycle parking space – occupant*”, “*bicycle parking space – visitor*”, “*grade*”, “*height*”, “*lot*”, “*parking space*” and Sections 4(2), 4(4), 4(12), 4(16), 4(17), 6(3) Part I 1, 6(3) Part II, and 6(3) Part III of By-law No. 438-86, being “A By-law To regulate the use of land and the erection, use, bulk, height, spacing of 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”, as amended, shall apply to prevent the erection and use of a residential building containing *dwelling units* on the lot provided that:

- (g) the lot comprises the lands identified as “95 and 99 Broadway Avenue and 197 Redpath Avenue” on the attached Map 1;
- (h) the residential gross floor area of the residential building does not exceed 56,000 square metres;
- (i) a total of 32 rental replacement dwelling units, comprised of at least 7 bachelor, 9 one-bedroom, 8 two-bedroom and 8 three-bedroom units to be located contiguously within the residential building with a total residential gross floor area of not less than 2,164 square metres as required pursuant to Appendix 1, to satisfy the replacement of rental dwelling units existing on the lot at the time of the enactment of this by-law;
- (j) no portion of any residential building above grade, is located otherwise than wholly within the areas delineated by heavy lines on the attached Map 2;
- (k) the height of any residential building or structure, or portion thereof, does not exceed those heights in metres as shown on the attached Map 2;
- (e) Notwithstanding sections 1.(c), 1.(d) of this By-law, the following building elements and structures are permitted to extend beyond the heavy lines and building envelopes, and above the heights specified on Map 2

Elements and Structures	Limitation
Eaves, cornices, window sills, landscape features, wheel chair ramps, light fixtures, stairs and stair enclosures, balustrades, bollards, window washing equipment, underground garage ramps and their associated structures, public art features, transformer vaults, elevator overruns, generators, cooling towers, trellises, planters	No limitations provided the height of such Element or Structure is not greater than 2.0 metres above the height limits established in this By-law.

Elements associated with a green roof	Permitted beyond the heavy lines on Map 2, subject to a maximum vertical projection of 0.5 metres above the height limits shown on Map 2
Railings	Permitted beyond the heavy lines on Map 2, subject to a maximum vertical projection of 1.2 metres above the height limits on Map 2
Fences, privacy screens	Permitted to extend above the heavy lines shown on Map 2, subject to a maximum vertical projection of 2.4 metres beyond the height limits shown on Map 2
Ornamental elements, architectural elements	Permitted to extend above the height limits shown on Map 2, subject to a maximum horizontal projection of 2.0 metres beyond the heavy lines shown on Map 2
Vents, stacks and chimneys	Permitted to extend beyond the heavy lines on Map 2, subject to a maximum vertical projection of 3.2 metres above the height limits shown on Map 2
Parapets	Permitted to extend beyond the heavy lines on Map 2 subject to a maximum vertical projection of 0.9 metres above the height limits shown on Map 2
Structures used for outside or open air recreation, safety or wind protection purposes	Permitted to extend beyond the heavy lines on Map 2, provided that the maximum height of the top of the structure is no higher than the sum of 3.0 metres and the

	applicable height limits shown on Map 2 and the structures shall not enclose space so as to constitute a form of penthouse or other room or rooms
Awnings, canopies	Permitted to extend above the height limits shown on Map 2, subject to a maximum horizontal projection of 3.0 metres beyond the exterior wall to which such awnings and canopies are attached
Balconies	Permitted to extend above the height limits on Map 2, subject to a maximum horizontal projection of 2.0 metres beyond the heavy lines shown on Map 2

a minimum of 1,854 square metres of *residential amenity space – indoor* shall be provided and maintained on the *lot*;

a minimum of 950 square metres of *residential amenity space – outdoor* shall be provided and maintained on the *lot*;

(l) parking shall be provided based on the following:

a minimum of 0.27 parking spaces per *dwelling unit* for residents;

a minimum of 0.03 parking spaces per *dwelling unit* for visitors;

(m) of the total number of parking spaces, 9 spaces shall be provided for the residents of the *rental replacement dwelling units*;

2. None of the provisions of By-law No. 438-86 shall apply to prevent a “*sales office*” on the *lot* as of the date of the passing of this By-law.

3. For the purposes of this By-law, the following expressions shall have the following meaning:

(g) “*bicycle parking space – occupant*” means an area that is equipped with a bicycle rack or locker for the purpose of parking and securing bicycles, and:

Where the bicycles are to be parked on a horizontal surface, has horizontal dimensions of at least 0.5 metres by 1.8 metres and a vertical dimension of at least 1.9 metres;

Where the bicycles are to be parked in a vertical position, has horizontal dimensions of at least 0.5 metres by 1.2 metres and a vertical dimension of at least 1.9 metres;

In the case of a bicycle rack, is located in a secured room or area;

- (h) “*bicycle parking space – visitor*” means an area that is equipped with a bicycle rack for the purpose of parking and securing bicycles, and:

Where the bicycles are to be parked on a horizontal surface, has horizontal dimensions of at least 0.5 metres by 1.8 metres and a vertical dimension of at least 1.9 metres;

Where the bicycles are to be parked in a vertical position, has horizontal dimensions of at least 0.5 metres by 1.2 metres and a vertical dimension of at least 1.9 metres;

May be located indoors or outdoors including within a secured room or enclosure;

- (i) “*grade*” means 160.165 metres Canadian Geodetic Datum;
- (j) “*height*” means the vertical distance between grade and the highest point of the building or structure;
- (k) “*lot*” means those lands identified as “95 and 99 Broadway Avenue and 197 Redpath Avenue” on Map 1 attached hereto;
- (l) “*rental replacement dwelling unit*” means a *dwelling unit* which replaces one of the rental units existing on the *lot* at the time of enactment of this by-law, as required pursuant to section 111 of the *City of Toronto Act*, 2006, S.O. 2006, c. 11 and Schedule 1;
- (m) “*sales office*” shall mean a building, structure, facility or trailer on the *lot* used for the purpose of the initial sale of *dwelling units* to be erected on the *lot*;
- (n) Every other word or expression which is italicized herein shall have the same meaning as each word or expression as defined in the aforesaid Bylaw No. 438-86, as amended.

4. Pursuant to Section 37 of the *Planning Act* and subject to compliance with this By-law, the increase in height and density of development on the *lot* contemplated herein is permitted in return for the provision by the owner, at the

owner's expense, of the facilities, services and matters set out in Appendix 1 hereof which are secured by one or more agreements pursuant to Section 37(3) of the *Planning Act* that are in a form and registered on title to the lot, to the satisfaction of the City Solicitor.

5. Where Appendix 1 of this By-law requires the owner to provide certain facilities, services or matters prior to the issuance of a building permit, the issuance of such permit shall be dependent on the satisfaction of the same.
6. The owner shall not use, or permit the use of, a building or structure erected with an increase in height and density pursuant to this By-law unless all provisions of Appendix 1 are satisfied.
7. Despite any existing or future severance, partition, or division of the *lot*, the provisions of this By-law shall apply to the whole *lot* as if no severance, partition or division occurred.

ENACTED AND PASSED this _____ day of _____, A.D. 2015.

Appendix 1

Section 37 Provisions

The facilities, services and matters set out below are required to be provided to the City at the *owner's* expense in return for the increase in height and density of the proposed development on the *lot* and secured in an agreement or agreements under Section 37(3) of the *Planning Act* whereby the *owner* agrees as follows:

1. Prior to the issuance of an above-grade building permit, the *owner* shall make an indexed payment of \$1,250,000.00 to the City. The funds are to be used for local improvements and beautification and street enhancement projects in consultation with the local councillor.
2. The Owner shall construct streetscape improvements to improve the public street frontages adjacent to the Site, in accordance with the approved landscape drawings to be secured in the Site Plan Agreement, equal to a value of \$250,000.00, to the satisfaction of the Chief Planner.
3. The amounts set out in Sections 1 and 2 shall be indexed upwardly in accordance with the Statistics Canada Non-Residential Construction Price Index for Toronto, calculated from the date of the Section 37 Agreement to the date the payment is made.
4. In the event the cash contributions have not been used for the intended purpose within three (3) years of this By-law coming into full force and effect, the cash contributions may be redirected for another purpose, at the discretion of the Chief Planner and Executive Director of City Planning, in consultation with the local Councillor, provided that the purpose is identified in the Toronto Official Plan and will benefit the community in the vicinity of the *lot*.
5. the *owner* shall provide the following to support the development of the *lot*:

Rental Replacement

- (a) The *owner* shall provide and maintain not less than 32 *rental replacement dwelling units* on the *lot*, subject to the following:
 - i. The 32 *rental replacement dwelling units* shall be provided entirely on the *lot*;
 - ii. The 32 *rental replacement dwelling units* shall be provided with all related facilities and services, and generally be of a similar size and unit mix as the existing units on the site at the date of enactment of this By-Law, with any modifications to the satisfaction of the Chief Planner, subject to the following:

- (i) The *rental replacement dwelling units* shall comprise a unit mix of at least five bachelor and nineteen one-bedroom units;
- (ii) The combined floor areas of the 32 *rental replacement dwelling units* will not be less than 2,164 metres squared, subject to the following:
 - a. The seven (7) bachelor units shall be not less than 37.4 metres squared , with five (5) being not less than 39.5 metres squared;
 - b. The nine (9) one-bedroom units shall be not less than 54 metres squared , with eight (8) being over 57 metres squared , and five (5) being not less than 62 metres squared;
 - c. The eight (8) two-bedroom units shall be not less than 75 metres squared , with three (3) not less than 79 metres squared, and one (1) shall be over 85 metres squared;
 - d. The eight (8) three-bedroom apartments shall be not less than 92 metres squared , with seven (7) over 100 metres squared, and three (3) over 105 metres squared; and
 - e. There shall be no interior bedrooms for any units, with each of the bedrooms in these 32 units having an exterior, openable window.
- iii. The 32 *rental replacement dwelling units* shall be maintained as rental units for at least 20 years, beginning with the date that each unit is occupied and until the *owner* obtains approval for a zoning by-law amendment removing the requirement for the replacement rental units to be maintained as rental units. No application may be submitted for condominium or for any other conversion to non-rental housing purposes, or for demolition without providing for replacement during the 20 year period;
- iv. All of the *rental replacement dwelling units* shall be ready and available for occupancy no later than the date by which 80% of the other *dwelling units* erected on the *lot* pursuant to this By-law amendment are available and ready for occupancy;
- v. A minimum of 2 one-bedroom *rental replacement dwelling units* shall be provided as affordable *rental replacement dwelling units* and a minimum of 22 *rental replacement dwelling units* shall be provided as mid-range *rental replacement dwelling units*, subject to the following:
 - a. The *owner* shall provide and maintain affordable rents charged to the tenants who rent each of the 4 bachelor,

3 one-bedroom, 3 two-bedroom and 4 three-bedroom affordable *rental replacement dwelling units* during the first 10 years of its occupancy, such that the initial rent shall not exceed an amount based on the most recent Fall Update Canada Mortgage and Housing Corporation Rental Market Report average rent for the City of Toronto by unit type, and over the course of the 10 year period, annual increases shall not exceed the Provincial Rent Guideline and, if applicable, permitted above-Guideline increases. Upon turn-over during the 10 year period, the rent charged to any new tenant shall not exceed an amount based on the initial rent, increased annually by the Provincial Rent Guideline, and any above-Guideline increase, if applicable;

- b. The *owner* shall provide and maintain rents no greater than mid-range rents charged to the tenants who rent each of the 18 mid-range *rental replacement dwelling units* during the first 10 years of its occupancy, such that the initial rent shall not exceed an amount based on the most recent Fall Update Canada Mortgage and Housing Corporation Rental Market Report average rent times 1.5 for the City of Toronto by unit type, and over the course of the 10 year period, annual increases shall not exceed the Provincial Rent Guideline and, if applicable, permitted above-Guideline increases. Upon turn-over during the 10 year period, the rent charged to any new tenant shall not exceed an amount based on the initial rent, increased annually by the Provincial Rent Guideline, and any above-Guideline increase, if applicable;
- c. Rents charged to tenants occupying an affordable *rental replacement dwelling unit* or a mid-range *rental replacement dwelling unit* at the end of the 10 year period set forth in subsections a. and b. above shall be subject only to annual increases which do not exceed the Provincial Rent Guideline and, if applicable, permitted above-Guideline increases, so long as they continue to occupy their unit or until the expiry of the rental tenure period set forth in subsection iii. above with a subsequent phase-in period of at least three years for rent increases; and

- d. Rents charged to tenants newly occupying a *rental replacement dwelling unit* after the completion of the 10 year period set forth in subsections a. and b. will not be subject to restrictions by the City of Toronto under the terms of subsections a. and b.

Tenant Relocation Assistance

- (b) The *owner* shall provide tenant relocation assistance to the tenants of the existing units affected by the demolition, in accordance with the more detailed Tenant Relocation and Assistance Plan to be included in the agreement or agreements, to the satisfaction of the Chief Planner. The assistance shall include at least:
 - i. an extended notice period before having to vacate for demolition;
 - ii. the right to return to a rental replacement unit;
 - iii. returning tenants will choose their rental replacement units by seniority, with provisions for special needs tenants, if required;
 - iv. all tenants shall receive financial assistance to assist with relocation beyond the amounts required by provincial legislation, with extra provisions for tenants with special needs.

Other Matters to Support the Development of the Lot

- (c) The *owner* shall incorporate in the construction of the building, and thereafter maintain, exterior materials shown on 1:50 scale drawings, approved by the Chief Planner and Executive Director, submitted for all the development's elevations.
- (d) Prior to the issuance of any site plan approval pursuant to Section 114 of the *City of Toronto Act, 2006* the *owner* of the *lot* shall provide a Construction Management Plan at its expense to the satisfaction of the Director, Development Engineering, and thereafter the owner shall implement such plan.
- (e) The *owner* shall satisfy the requirements of the Toronto Catholic District school Board and the Toronto District School Board regarding warning clauses and signage.
- (f) The *owner* shall meet or exceed Tier 1 of the Toronto Green Standard.

