

John Filion

Re: Item NY31.6.2

Toronto City Councillor - Ward 23, Willowdale

Date: June 6th, 2018
To: North York Community Council –City Clerk's Office-Secretariat
From: Councillor John Filion
Subject: OMB Decision for 36-40 Churchill Avenue

Attached is a copy of the Ontario Municipal Board Decision regarding 36-40 Churchill Avenue issued on November 22nd, 2017.



Toronto City Hall
100 Queen Street W., Suite B36
Toronto, Ontario M5H 2N2
Tel: (416) 392-0210
Fax: (416) 392-7388
councillor_filion@toronto.ca

North York Civic Centre
5100 Yonge Street
Toronto, Ontario M2N 5V7
Tel: (416) 395-6411
Fax: (416) 395-6441
www.johnfilion.ca

Ontario Municipal Board
Commission des affaires municipales
de l'Ontario



ISSUE DATE: November 22, 2017

CASE NO(S): PL150631

PROCEEDING COMMENCED UNDER subsection 22(7) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant and Appellant:	2397623 Ontario Ltd. and 2426684 Ontario Ltd.
Subject:	Request to amend the Official Plan - Failure of City of Toronto to adopt the requested amendment Neighbourhood
Existing Designation:	Site Specific (To be determined)
Proposed Designated:	To permit the development of eighteen townhouses in three blocks
Purpose:	36, 38 And 40 Churchill Avenue
Property Address/Description:	City of Toronto
Municipality:	14 260003 NNY 23 OZ
Approval Authority File No.:	PL150631
OMB Case No.:	PL150631
OMB File No.:	PL150631
OMB Case Name:	2397623 Ontario Ltd. v. Toronto (City)

PROCEEDING COMMENCED UNDER subsection 34(11) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant and Appellant:	2397623 Ont. Ltd. & 2426684 Ont. Ltd.
Subject:	Application to amend Zoning By-law No.7625 - Refusal or neglect of City of Toronto to make a decision
Existing Zoning:	One Family Detached Dwelling Fourth Density Zone (R4)
Proposed Zoning:	Site Specific (To be determined)
Purpose:	To permit the development of eighteen townhouses on three blocks
Property Address/Description:	36, 38 And 40 Churchill Avenue
Municipality:	City of Toronto
Municipality File No.:	14 260003 NNY 23 OZ
OMB Case No.:	PL150631
OMB File No.:	PL150632

PROCEEDING COMMENCED UNDER subsection 114(15) of the *City of Toronto Act, 2006*, S.O. 2006, c. 11, Sched. A

Subject:	Site Plan
Referred by:	2397623 Ontario Ltd. and 2426684 Ontario Ltd.
Property Address/Description:	36, 38 And 40 Churchill Avenue
Municipality:	City of Toronto
OMB Case No.:	PL150631
OMB File No.:	MM150080

Heard: February 9, 10, 11, and 12, and September 7, 8, and 9, 2016

APPEARANCES:

Parties

2397623 Ontario Limited and
2426684 Ontario Limited

City of Toronto

Counsel

C. Tanzola
K. Oksenberg

M. Longo
S. Amina (student-at-law)

INTERIM DECISION OF THE BOARD DELIVERED BY JAMES R. MCKENZIE

[1] Two numbered companies — 2397623 Ontario Limited and 2426684 Ontario Limited (collectively, “Applicant/Appellant”) — own three contiguous properties in Toronto known municipally as 36, 38, and 40 Churchill Avenue (collectively, “subject property”). Desiring to redevelop the subject property with 18 townhouses, they applied to the City of Toronto (“City”) for amendments to its Official Plan (“OP”) and comprehensive zoning by-laws, and for site plan approval, to realise that aspiration. The City did not make a decision on the applications within statutory time periods and appeals were subsequently launched.

[2] The hearing convened on the appeals dealt with several issues from which two emerged as primary considerations to which this decision directs itself: first, whether townhouses, as a type of residential land use, are permitted on the subject property

under the OP designation regulating its use; and second, whether the proposed 18-townhouse scheme represents good planning and is appropriate given the subject property's context. Concerning the first question, the Board finds that townhouses are a permitted use on the subject property; concerning the second, the Board finds that the 18-townhouse scheme represents an overdevelopment of the subject property, given its context, and does not represent good planning. Following some preliminary matters, this decision takes up each issue in the same order as is set out above, and provides its reasons supporting the noted findings.

[3] Seven witnesses testified before the Board: one lay witness — Tony Cimino, a local resident — and six experts, the Applicant/Appellant and the City each calling three. Andrew Ferancik (planning), Rick Merrill (urban design), and Kenneth Chan (traffic and transportation) testified in support of the 18-townhouse scheme. Jason Brander (planning), Robert Gibson (policy planning), and Helene Iardas (urban design) testified in opposition to the scheme. Each of the six experts was qualified by the Board in his or her area of expertise to provide opinion evidence.

[4] The subject property is located one block west of Yonge Street, approximately equidistant between Finch Avenue West and Park Home Avenue. It abuts the west boundary of — and is outside of — the North York Centre Secondary Plan. The North York Centre is an area of significant intensification in the form of transit-based, higher density, employment and residential land uses. It covers lands on and adjacent to Yonge Street between Highway 401 (to the south) and Drewry Avenue/Cummer Avenue (to the north), and includes concentrations at the Sheppard, North York Centre, and Finch subway stations.

[5] The neighbourhood within which the subject property is situated consists of ground-oriented residential uses and institutional uses (schools, parks, and a church). The residential land uses include single detached dwellings and two townhouse complexes: the Johnson Farm Lane complex consisting of 36 four-storey townhouses, and the McBride Lane complex consisting of 49 three-storey townhouses. More will be said about these residential uses in the following section.

[6] The subject property is generally rectangular in shape, with frontage on the north side of Churchill Avenue of approximately 46 metres, and (owing to the fact that the alignment of Churchill is not parallel with the property's rear lot line) depths of approximately 49 metres on the east and 62 metres on the west. It is currently occupied by three detached dwellings, one on each municipally-numbered property. The Applicant/Appellant proposes razing the three dwellings and erecting 18 townhouses grouped in three blocks. Blocks 1 and 2 each include four townhouses fronting on Churchill, and are separated by an internal T-shaped access driveway from Churchill located at the mid-point of the front lot line. Block 3 includes 10 townhouse units, which front on and take vehicular access from the north side (top side) of the T-driveway. The townhouses in Blocks 1 and 2 take vehicular access from the rear on the south side (bottom side) of the T-driveway. A graphic representation of the scheme — taken from Mr. Brander's Request for Direction Report (Exhibit 23, Tab 7) — is appended to this decision as Attachment 1.

Are townhouses a permitted use? Yes.

[7] The subject property is designated *Neighbourhoods* in the City's OP.

[8] The respective testimony by Mr. Ferancik and Mr. Brander is the only relevant evidence pertaining to this issue, and it is therefore only that evidence taken up and analysed in this section of the decision. Mr. Ferancik opined that townhouses are a permitted use on the subject property given its *Neighbourhoods* designation and that an amendment to the OP is not necessary. Mr. Brander, on the other hand, opined that townhouses are not a permitted use and that an OP amendment is required. The relevant sections of the OP — both policy and non-policy sidebar text — are set out below. (A note to readers unfamiliar with the City's OP: non-policy sidebar text does not regulate land use as policy does, which is considered operative; sidebar text is provided to make policy and its intent more accessible and understandable.)

[9] Operative policy includes Section 4.1.1 and Section 4.1.5:

4.1 NEIGHBOURHOODS

4.1.1 *Neighbourhoods* are considered physically stable areas made up of residential uses in lower scale buildings such as detached houses, semi-detached houses, duplexes, triplexes and townhouses, as well as walk-up apartments that are no higher than four storeys....

4.1.5 Development in established *Neighbourhoods* will respect and reinforce the existing physical character of the neighbourhood, including in particular:

- a) patterns of streets, blocks and lanes, parks and public building sites;
- b) size and configuration of lots;
- c) heights, massing, scale and dwelling type of nearby residential properties;
- d) prevailing building type(s);
- e) setbacks of buildings from the street or streets;
- f) prevailing patterns of rear and side yard setbacks and landscaped open space;
- g) continuation of special landscape or built-form features that contribute to the unique physical character or a neighbourhood: and,
- h) conservation of heritage buildings, structures or landscapes.

No changes will be made through rezoning, minor variance, consent or other public action that are out of keeping with the physical character of the neighbourhood.

The prevailing building type will be the predominant form of development in the neighbourhood. Some *Neighbourhoods* will have more than one prevailing building type. In such cases, a prevailing building type in one neighbourhood will not be considered when determining the prevailing building type in another neighbourhood.

[10] Non-policy sidebar text includes:

Prevailing Building Types

Many zoning by-laws currently permit only single detached houses. The type of dwellings permitted varies among neighbourhoods and these detailed residential use lists are contained in the established zoning by-laws which will remain in place and establish the benchmark for what is to be permitted in the future. If, for example, an existing zoning by-law permits only single detached houses in a particular neighbourhood and the prevailing (predominant) building type in that neighbourhood is single detached dwellings, then the Plan's policies are to be interpreted to allow only single detached dwellings in order to respect and reinforce the established physical character of the neighbourhood, except where the infill development policies of Section 4.1.9 would be applicable. While most *Neighbourhoods* will have one prevailing building type, some may

have more. For example, multiples may prevail at the edge, along major streets, while singles may prevail in the interior, along local roads.
[Underlining added by the Board]

[11] Mr. Brander draws on the relationship between these three parts of the OP to conclude that townhouses are not a permitted use on the subject property given its *Neighbourhoods* designation. First, it is his opinion that Section 4.1.1 does not represent an explicit permission allowing townhouses as a land use under the *Neighbourhoods* designation; it is, instead, simply an overarching policy acknowledging that townhouses represent a type of land use, amongst others, that can be present in neighbourhoods. Next, according to Mr. Brander, there is a specific analysis to be engaged to determine whether townhouses are a permitted land use on a particular property under the *Neighbourhoods* designation — and that analysis is grounded in the relationship between Section 4.1.5 and the non-policy sidebar text. Mr. Brander's analysis is explained below.

[12] Mr. Brander's analysis begins with his delineation of the neighbourhood within which the subject property is located and its adoption as his study area. That neighbourhood is bounded by Senlac Road on the west, the rear lot line of properties fronting Hounslow Avenue on the north, the westerly boundary on the North York Centre Secondary Plan on the east, and the rear lot line of properties fronting Ellerslie Avenue on the south. His analysis, set out in Exhibit 27, his evidence outline, is premised on a detailed enumeration of residential lots in the study area, which by his count total 581.

[13] According to Mr. Brander, the prevailing building type in his neighbourhood study area is single detached dwellings. He bases this conclusion on both the R4 zoning classification which permits only single detached dwellings and on his calculation that townhouses constitute only 11.8% of the lots in this study area. Applying Section 4.1.5 and the non-policy sidebar text, he opines based on that percentage that townhouses are not the predominant land use and cannot therefore be the prevailing building type. Relying on the non-policy sidebar text, which he applies literally, he concludes that townhouses are not a permitted land use because the non-policy sidebar text affirms as

much based on the example it provides.

[14] Mr. Brander's approach diverges from that which Mr. Ferancik applies. Mr. Ferancik's analysis of the policy context draws on a recognition that the neighbourhood within which the subject property is located is not monolithic; that it is comprised of different forms of residential development, including townhouses (in the Johnson Farm Lane complex and the McBride Lane complex). Mr. Ferancik's analysis distinguishes different elements of the neighbourhood: a broader neighbourhood, roughly consistent with but slightly larger (to the north and south) than the neighbourhood study area underpinning Mr. Brander's analysis; and an immediate neighbourhood, encapsulating that area a block or two out from the subject property south and west, and which includes the two townhouse complexes named above.

[15] According to Mr. Ferancik, Section 4.1.5 and the non-policy sidebar text eschew a strictly quantitative analysis. In his opinion, the neighbourhood has more than one prevailing building type, a conclusion, he maintains, that is supported by both the on-the-ground pattern of land uses and the fact that the existing zoning regulating the immediate area of the neighbourhood establishes permissions for both building types, detached dwellings and townhouses. Mr. Ferancik maintains that townhouses are a permitted land use because they respect and reinforce the existing physical character of the neighbourhood as is required by Section 4.1.5.

[16] The Board has immersed itself in the operation of the OP extracts — both policy and non-policy — to which Messrs. Brander and Ferancik directed its attention, and has carefully considered each planner's respective evidence. The Board prefers the evidence proffered by Mr. Ferancik for the following reasons.

[17] It is clear to the Board that the interpretation of Section 4.1.5 is complemented by the non-policy sidebar text entitled 'Prevailing Building Types.' That text is helpful for shedding some light on the intent of Section 4.1.5 and on how the City will apply that policy in situations where development is proposed in established *Neighbourhoods*. The sidebar text, however, does not bathe Section 4.1.5 in complete light because it

limits itself to offering only one scenario for consideration: that of a neighbourhood zoned only for and consisting only of single detached dwellings. Mr. Brander draws heavily — exclusively, really — on the application of the one sentence from the sidebar text framing that scenario: *“If, for example, an existing zoning by-law permits only single detached houses in a particular neighbourhood and the prevailing (predominant) building type in that neighbourhood is single detached dwellings, then the Plan’s policies are to be interpreted to allow only single detached dwellings in order to respect and reinforce the established physical character of the neighbourhood...”* His conclusion that townhouses are not permitted is based on this particular sentence. The difficulty in this case is that Mr. Brander has applied the non-policy sidebar text in an uncritical, formulaic fashion and in so doing has, in effect, elevated the sidebar text to a position of operating as if it were actual policy.

[18] Relying on that single sentence of the sidebar text, the first difficulty with Mr. Brander’s analysis concerns his consideration of what the existing zoning by-law permits in the neighbourhood study area he adopted as the foundation for his work. (The Board bases its own analysis in this section on Zoning By-law No. 7625, as amended, the in-force zoning.) Mr. Brander’s analysis is premised on a conclusion he draws based on the R4 zoning classification — which covers the majority of the neighbourhood he adopted for his analysis — permitting only single detached dwellings. And that is correct: the R4 zoning classification only permits single detached dwellings. The R4 classification, however, is not the only zoning classification applicable in the neighbourhood Mr. Brander studied — and therein lies the problem with Mr. Brander’s analysis. Zoning By-law No. 7625, as amended, also includes zoning classifications that allow townhouses, specifically the Johnson Farm Lane and the McBride Lane townhouse complexes. Mr. Brander’s analysis erroneously treats the total neighbourhood he studied as equal to the area covered by the R4 zoning classification. The two are not the same; they are not interchangeable despite his treating them as such. If the sentence upon which Mr. Brander relies is thought of as a formula, then permissions under the existing zoning by-law represent, in a manner of speaking, the first ingredient. The first ingredient of the formula, though, is not actually present in this case; the existing zoning by-law covering the neighbourhood permits more than single

detached dwellings.

[19] The second difficulty with Mr. Brander's analysis concerns conclusions he draws about the predominant built form of the neighbourhood and how he then applies those conclusions to arrive at an opinion that townhouses are not a permitted land use. His conclusions are made known by several statements in his oral testimony and in his evidence outline. Taking a strictly quantitative approach, Mr. Brander maintains that single detached dwellings are the predominant built form in the neighbourhood because they constitute 88.2% of the lots in the neighbourhood according to his calculations. He adds that, "[t]he immediate neighbourhood context is that of single detached dwellings on larger lots, which are fairly consistent in shape and area as seen in the study area context." The Board finds it curious that he would refer to the 'immediate neighbourhood context,' a concept consistent with Mr. Ferancik's approach that, based on existing land uses, differentiates between the immediate and broader neighbourhoods. In the immediate neighbourhood, development is characterised by two predominant built forms — townhouses and single detached dwellings. This conclusion is obvious from a visual inspection of Exhibit 3, Mr. Ferancik's visual document book, which includes a geographic delineation of the immediate neighbourhood showing individual lots — both single detached dwellings and townhouses. Townhouses comprise more than 50% of the lots in this context. Again, taking the single sentence upon which Mr. Brander relies as a formula, the second ingredient is also not present in this case.

[20] Accordingly, the Board finds that townhouses are a permitted land use under the *Neighbourhoods* designation as it applies to the subject property. As the product of an exercise interpreting existing, in-force OP policy, it follows that this finding is consistent with the Provincial Policy Statement, 2014 and conforms to the Growth Plan for the Greater Golden Horseshoe, 2017, since both consistency and conformity are requirements of the *Planning Act* for an official plan to be approved in the first place. Moreover, this finding renders the application filed by the Applicant/Appellant to amend the City's OP unnecessary. That application was limited to permitting a specific number of townhouses on the subject property; it did not seek to amend any other policy of the

OP. Nevertheless, because the City demanded the application, and because it was made, paid for, and appealed, the Board will allow the appeal so as to eliminate the possibility of any residual ambiguity at some future time about permitted land uses on the subject property.

[21] The Board now turns to its analysis of the second issue.

Is the 18-townhouse scheme appropriate and reflective of good planning? No.

[22] Having established that townhouses are a permitted land use under the *Neighbourhoods* designation of the OP as it relates to the subject property, the question of whether the proposed 18-townhouse scheme represents an appropriate development is now taken up. It is the Board's finding that the proposed scheme presented in this hearing is not appropriate on or for the subject property. The manner in and scale at which the townhouse permission is deployed represents an overdevelopment of the subject property; in short, given its specific context, it is too much development on too little lot and in so being fails to satisfy several policies of the OP. That should not, however, be understood to mean that the townhouse permission in the OP cannot be realised on the subject property.

[23] The suitability of the proposed scheme was addressed principally by Mr. Ferancik and Mr. Merrill, and by Mr. Brander and Ms. Iardis. Before addressing any evidence relating specifically to the proposed scheme's conformity with the OP, the Board will first address Mr. Gibson's evidence.

[24] Mr. Gibson is a policy planner responsible, in part, for the North York Secondary Plan Area. A central component of the Applicant/Appellant's case is the theory that placing townhouses on the subject property will perform a transitioning function between the higher densities of the Secondary Plan Area and the lower densities of the neighbourhood within which the subject property is located. Mr. Gibson's evidence very clearly demonstrates that the policies of the Secondary Plan incorporate a transitioning function for lands on the periphery of and within the Secondary Plan Area. According to

Mr. Gibson, at the time the Secondary Plan was formulated, an explicit decision was made to address transitioning inside its boundary for the specific purpose of removing pressure on adjacent lands to perform a transitioning function. His evidence also established that those policies are operating as intended.

[25] Mr. Gibson's evidence on the efficacy of the Secondary Plan's policies is uncontradicted. In fact, it was confirmed by Mr. Ferancik when, during cross-examination, he acknowledged first that the policies of the Secondary Plan are doing their job, and second that the subject property is not defined in policy as a transition site. And it was confirmed by Mr. Merrill when, during cross-examination, he acknowledged that he agreed with Mr. Ferancik's evidence. Accordingly, the Board accepts Mr. Gibson's evidence to support a finding that the transition theory advanced by the Applicant/Appellant is unwarranted. That the subject property could perform a transitioning function does not mean that it need do so. The townhouse permission in the OP stands on its own.

[26] In addition to the policy tests set out in Section 4.1.5 noted above, additional policy tests are established in Sections 2.3.1.1 and 3.1.2 of the OP:

2.3.1 HEALTHY NEIGHBOURHOODS

2.3.1.1. *Neighbourhoods ...* are considered to be physically stable areas. Development within *Neighbourhoods ...* will be consistent with this objective and will respect and reinforce the existing physical character of buildings, streetscapes and open space patterns in these areas.

3.1.2 BUILT FORM

- 3.1.2.1 New development will be located and organized 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 interest and casual views to these spaces from the development by:
- a) generally locating buildings parallel to the street or along the edge of a park or open space with a consistent front yard setback...;
 - b) locating main building entrances so that they are clearly visible and directly accessible from the public sidewalk;
 - c) providing ground floor uses that have views into and, where possible, access to, adjacent streets, parks and open spaces; and

- d) preserving existing mature trees wherever possible and incorporating them into landscaping designs.
- 3.1.2.3 New development will be massed and its exterior façade will be designed to fit harmoniously into its existing and/or planned context, and will limit its impact on neighbouring streets, parks, open spaces and properties by:
- a) massing new buildings to frame adjacent streets and open spaces in a way that respects the existing and/or planned street proportion;
 - b) incorporating exterior design elements, their form, scale, proportion, pattern, and materials, and their sustainable design, to influence the character, scale, and appearance of the development;
 - c) creating appropriate transitions in scale to neighbouring existing and/or planned buildings for the purpose of achieving the objectives of this Plan;
 - d) providing adequate light and privacy;
 - e) adequately limiting any resulting shadowing of, and uncomfortable wind conditions on, neighbouring streets, properties and open spaces, having regard for the varied nature of such areas; and
 - f) minimizing any additional shadowing and uncomfortable wind conditions on neighbouring parks as necessary to preserve their utility.

[27] Two other City documents also informed the respective analyses undertaken by the professional witnesses: the *Infill Townhouse Development Guidelines* and the *Development Infrastructure Policy and Standards*.

[28] Turning to its own analysis, having regard to the relevant policy tests set out in the OP, the Board prefers the evidence of Ms. Iardas and Mr. Brander to that of Mr. Ferancik and Mr. Merrill for the following reasons.

[29] The level of analysis undertaken by the Applicant/Appellant's planner and urban designer do not instill a necessary confidence upon which the Board can sustain a finding that the proposed townhouse scheme satisfies the relevant policy tests. The evidence certainly offers professional opinions and commentary that those tests are satisfied. What is missing from that commentary and citation of professional opinion, however, is a depth of analysis that details with precision how the proposed townhouse scheme will fulfill the policies as Messrs. Ferancik and Merrill believe it will. Take, for example, evidence relating to the built form policies in the OP.

[30] Section 3.1.2.1 requires that “[n]ew development will be ...organized to fit with its existing and/or planned context.” It then sets out particulars through which it is envisaged new development will sustain that context. Mr. Ferancik’s evidence on Section 3.1.2.1 has three sources: his oral testimony, his Witness Outline (Exhibit 6), and his Planning Justification Report (Exhibit 12). Telling the Board that “all are satisfied,” he took the Board through paragraph 131 of his Witness Outline, which replicates points raised in the following passage from page 16 of his Planning Justification Report dealing with the same policy:

The proposed development will be built parallel to the street in a staggered layout that will address the angle of Churchill Avenue. It will incorporate a minimum 1.95 metre setback that will continue the setback established by the adjacent dwelling to east providing a good relationship to the street and an appropriate streetscape transition to the Centre [namely, the North York Secondary Plan Area]. South block units will front directly onto Churchill Avenue with main entrances and stoops continuing the character established by the adjacent dwellings. Ground floor uses will provide views onto Churchill Avenue and into the proposed park on the south side of Churchill Avenue. Trees along the eastern periphery of the site will be protected.

[31] Mr. Ferancik provides no other analysis specific to Section 3.1.2.1, from which the Board makes two observations. First, the analysis Mr. Ferancik does provide focuses only the sub-lettered particulars set out in Section 3.1.2.1. That is arguably what he was referring to in his “all are satisfied” testimony, and there is nothing else in the cited passage directed to anything in the policy beyond the particulars. Second, his analysis is implicitly based on Blocks 1 and 2 of the proposed townhouse scheme; by inference, it is clear that Block 3 does not factor in to any of his conclusions. Both reveal a critical oversight: that of not addressing the fundamental intent of the policy, namely, articulating how the organisation of the proposed townhouse scheme (meaning all of it) fits its existing and/or planned context. Mr. Ferancik’s approach is premised on a notion that satisfaction of the particulars — which, at best, is ambiguous given the exclusion of Block 3 in any of his references — represents a *de facto* satisfaction of the full policy, that the fundamental intent is somehow taken care of by addressing the particulars. That is not the case. While the particulars certainly supplement the fundamental intent of the policy, they are not a proxy for that intent.

[32] The evidence of Mr. Brander and, particularly, Ms. Iardas makes very clear that the proposed townhouse scheme is not organised to fit with its existing and/or planned context, and also, as required by Section 4.1.5, does not respect and reinforce the existing physical character of the neighbourhood. Ms. Iardas's analysis of the proposed scheme was both thorough and cogent. For her, the various policies of the OP relevant to this matter direct themselves to the relationship between existing and proposed development and, specifically, to what the interface between existing and proposed reveals about compatibility and appropriateness. Ms. Iardas's evidence identified numerous concerns with the proposed scheme, many of which relate specifically to Block 3. In her opinion, the units of Block 3 will import activities into an area of the block otherwise intended for recreational purposes (i.e., rear yards), and thereby introduce a house-behind-a-house condition that is "ripe for adverse impacts" relating, for example, to noise, light trespass, headlight penetration, and other annoyances relating to vehicular activities.

[33] She also took the Board through the *Infill Townhouse Development Guidelines* ("guidelines") and methodically demonstrated how the proposed scheme fails to address many important objectives directed at achieving a seamless integration of new development with existing residential uses. Her level of attention to the guidelines stands in contrast to Mr. Ferancik's and Mr. Merrill's respective evidence on the same document.

[34] Mr. Ferancik and Mr. Merrill each addressed the guidelines and opined that the proposed scheme has adequate regard for their content. They each demonstrated that the proposed scheme responds constructively to several objectives set out in the guidelines. Mr. Merrill also told the Board that compromise is necessary when dealing with infill situations and that the unique elements of a given context sometimes mean that not every guideline objective can be achieved. While the Board generally accepts that a pedantic application of guidelines poses its own challenges, it equally accepts the utility of guidelines as a tool of planning analysis in the appropriate place. To this panel's thinking, that means that a balanced approach is called for when applying guidelines in the service of assessing conformity with OP policy. In this case, however,

Ms. Iardas's evidence makes it clear that a balanced approach has not been achieved. Mr. Ferancik's and Mr. Merrill's respective consideration of the guidelines is found to be top-of-the-funnel, and, where they did drill down, highly selective when compared with the meticulous approach demonstrated by Ms. Iardas.

[35] Turning to consideration of a different policy in the OP, Section 2.3.1.1 considers *Neighbourhoods* as physically stable areas and requires that development, "be consistent with [that] objective and ... respect and reinforce the existing physical character of ... open space patterns...." Mr. Merrill testified that the proposed townhouse scheme satisfies this requirement, but he did not provide the Board with any satisfactory analysis articulating the underpinnings for that conclusion. In cross-examination, he acknowledged that the pattern of landscaped open space in rear yards throughout the neighbourhood — a fundamental policy consideration also established in Section 4.1.5 — reflects "channels of green," and he admitted that nowhere in the neighbourhood was there a dwelling in a channel of green.

[36] Consideration of the aerial photograph evidence makes it patently clear that the proposed townhouse scheme — specifically Block 3 — presents itself as an anomaly in the neighbourhood and constitutes an unacceptable intrusion into the pattern of rear yard landscaping when taken into account with the evidence of Ms. Iardas describing the potential for adverse impacts. While there are other townhouse complexes in the neighbourhood, they are organised in a manner so as to not be an intrusion. What is also clear is that it is the magnitude of the intrusion that directly informs the finding that Block 3 does not respect and reinforce aspects of existing physical character. It is conceivable that some threshold exists below which development penetration toward the rear of the subject property could still comply with the intent of Section 2.3.1.1. Absent an explanation from Mr. Merrill, however, as to the foundation for his opinion on this particular policy, the Board is at a loss to understand how the proposed scheme fulfills its intent.

[37] There are three other matters to which the Board need direct its attention.

[38] The first matter relates to an alternative, 16-townhouse scheme tendered by the Applicant/Appellant. This alternative was filed with the Board to address the Applicant/Appellant's obligations under s. 42 of the *Planning Act* with respect to the provision parkland in the event the City was to require a dedication of land rather than accept cash-in-lieu. The deletion of two townhouse units — one from Block 1 and another from Block 3 — makes land available for dedication but does not address the interface along the mutual lot line between the subject property and the public lands to its east contemplated as a linear park at some future time. Even with this alternative, Block 3 remains the problematic component of the scheme and nothing in the alternative scheme changes that finding of the Board.

[39] The second matter concerns evidence led by the Applicant/Appellant with respect to three townhouse developments on Finch Avenue East (Exhibits 21-A, 21-B, and 21-C) that are each organised in a manner either identical or very similar to that reflected by the proposed scheme: that is, three townhouse blocks arrayed on a T-shaped driveway and which abut single detached or semi-detached dwellings. The Board was told that the City approved each, the implication being that the position taken by the City with respect to the proposed townhouse scheme in this hearing is inconsistent with those previous decisions, and further that if such an arrangement was deemed acceptable on each of those other sites then there is no reason why it should not be acceptable in this case.

[40] While there are similarities, the Board is not persuaded that they are suitable comparators. First, the other sites are situated in very different contexts. They each take access from a major arterial street, Finch Avenue East, which performs a different function and experiences a different magnitude of vehicular activity than does Churchill Avenue. Second, each property is designated *Mixed Use* in the OP, a designation that establishes a planned context which contemplates and promotes intensification within which such a layout is considered tolerable for that context.

[41] And lastly, the third matter concerns what role, if any, Section 4.1.9 in the OP has in the Board's deliberations on the matters before it. Section 4.1.9 is a policy that deals

with infill development on properties that vary from the existing lot pattern in established *Neighbourhoods*, and it sets out several particulars with which new development must comply. Mr. Ferancik and Mr. Brander disagreed about whether Section 4.1.9 was applicable to the matters under appeal, the former testifying that it is and the latter that it is not. Mr. Ferancik maintains that Section 4.1.9 is relevant, in part because it establishes additional (albeit different) tests to assess development on lands designated *Neighbourhoods* in the OP.

[42] It is the Board's finding that Section 4.1.9 is not applicable policy concerning the matters under appeal and therefore has no role in any consideration of the proposed townhouse scheme. Drawing on the preamble text to Section 4.1.9, the evidence from Mr. Brander is that this policy is meant to apply only to larger properties in a neighbourhood on which, for example, an institutional use like a church or a school was originally sited and which is no longer viable, rendering those properties a candidate for redevelopment. What is evident to the Board is that the three lots comprising the subject property do not vary from the established lot pattern of the neighbourhood, a first test in terms of policy applicability in this case. The Board was not presented with any evidence confirming that title to the three lots had merged, thus rendering a single property for the purposes of either title or testing OP conformity. More importantly, however, the Board heard no persuasive evidence to support the notion that lot consolidations — which arguably could happen in any neighbourhood — can appropriate the intent of Section 4.1.9.

Decision

[43] In parallel with its finding that townhouses are a permitted use under the *Neighbourhoods* designation in the OP as it applies to the subject property, the Board will allow the appeal of the application to amend the OP to make explicit that townhouses are a permitted use on the subject property. The Board will not at this time, however, approve that amendment to specify the number of townhouses. It will withhold its order as explained in more detail below. This finding and decision, moreover, shall not be interpreted as permitting any amendment to the OP beyond

clarifying that townhouses, (of some number to be determined through a process discussed below), are a permitted use on the subject property.

[44] Recognising that the proposed 18-townhouse and 16-townhouse schemes are both inappropriate, the Board will not approve amendments to the comprehensive zoning by-laws at this time. And, in view of the determination that townhouses are a permitted use on the subject property, nor will the Board dismiss that appeal outright at this time. Instead, the Board will provide time to the Applicant/Appellant and the City to engage in discussions to explore the potential for consensus by addressing the many details articulated by Ms. Iardas. The parties will have no more than six months from the date of this decision to do so. In the event they come to consensus, counsel are directed to contact the Board and arrange a continuation of the hearing to consider evidence relating to their agreement. In the event, however, that they cannot achieve consensus, or should one of them elect to not engage in discussions for that purpose, the Board will reconvene the hearing into the appealed matters upon the expiry of that six month period, or at an earlier time in the event discussions are rejected, to consider further evidence if and as necessary and finally dispose of the appeals.

[45] Finally, the Board will hold in abeyance its consideration of the site plan approval appeal. That application will require revisions based on the Board's findings, and may be addressed through the process set out in paragraph [44].

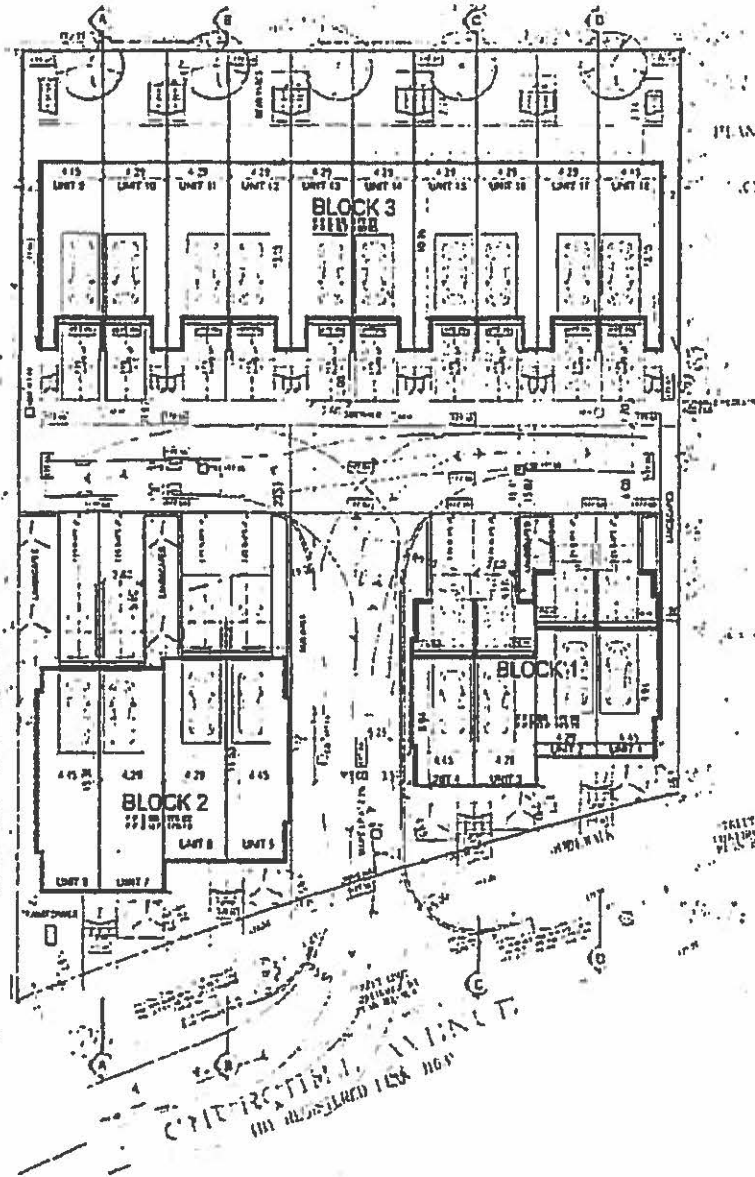
"James R. McKenzie"

JAMES R. McKENZIE
ASSOCIATE CHAIR

If there is an attachment referred to in this document,
please visit www.elfto.gov.on.ca to view the attachment in PDF format.

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 1: Site Plan



Site Plan

36, 38 & 40 Churchill Avenue

Applicant's Submitted Drawing

Not to Scale
01/04/2015

File # 14 260003 NNY 23 OZ