

Ontario Municipal Board
Commission des affaires municipales
de l'Ontario



ISSUE DATE: November 24, 2016

CASE NO(S): PL150732

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

Applicant and Appellant: Bel-East Corp. and Bel Ontario Inc.
Subject: Application to amend Zoning By-law No. 438-86
- Neglect of City of Toronto to make a decision
Reinvestment Area (RA)
Existing Zoning: Site Specific (To be determined)
Proposed Zoning: To permit a 25-storey mixed-use building
Purpose: 53, 61, 65 Ontario Street and 102 Berkeley
Property Address/Description: Street
Municipality: City of Toronto
Municipality File No.: 15 113777 STE 28 OZ
OMB Case No.: PL150732
OMB File No.: PL150732
OMB Case Name: Bel-East Corp. and Bel Ontario Inc. v. Toronto
(City)

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

Referred by: Bel-East Corp. and Bel Ontario Inc.
Subject: Site Plan
Property Address/Description: 53, 61, 65 Ontario Street and 102 Berkeley
Street
Municipality: City of Toronto
OMB Case No.: PL150732
OMB File No.: MM150082

PROCEEDING COMMENCED UNDER subsection 53(14) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant and Appellant: Bel-East Corp and Bel Ontario Inc
Subject: Application for Consent - Failure of the City of
Toronto to make a decision
Purpose: To permit an severance contemplates a 25-

Property Address/Description:	storey mixed-use building
Municipality:	53 and 61 Ontario St and 102 Berkeley St
Municipal File No.:	City of Toronto
OMB Case No.:	B0010/16TEY
OMB File No.:	PL150732
	PL160469

Board Rule 107 states:

107. Effective Date of Board Decision A Board decision is effective on the date that the decision or order is issued in hard copy, unless it states otherwise.

Pursuant to Board Rule 107, this decision takes effect on the date that it is e-mailed by Board administrative staff to the clerk of the municipality where the property is located.

Heard: September 13 to 15, 2016 in Toronto, Ontario

APPEARANCES:

<u>Parties</u>	<u>Counsel</u>
Bel-East Corp. and Bel Ontario Inc.	K. M. Kovar
City of Toronto	M. Crawford

DECISION DELIVERED BY M. CARTER-WHITNEY AND PARTIAL ORDER OF THE BOARD

BACKGROUND

[1] Bel-East Corp. and Bel Ontario Inc. ("Applicants") have applied to the City of Toronto ("City") for a zoning by-law amendment ("ZBLA"), provisional consent and site plan in relation to lands at 53, 61 and 65 Ontario Street and 102 Berkeley Street ("subject lands") to redevelop the partially vacant site with a 25-storey building (at a height of 83.23 metres ("m") including the mechanical penthouse floor), incorporating an eight-storey podium (25.7 m) and containing 274 units and commercial space on the ground and mezzanine floors ("development site"). The Applicants propose to sever the

development site from the portion of the subject lands that fronts onto Berkeley Street. The existing warehouse building on Berkeley Street is currently used as a furniture store and that use is anticipated to continue. The parcels of land fronting on Ontario Street were previously occupied by a four storey office building (demolished prior to the ZBLA application), a surface parking lot and 2½ storey detached dwelling currently used for a mix of residential and commercial purposes.

[2] The City failed to make a decision on the applications within the prescribed time periods and the Applicants filed appeals to the Ontario Municipal Board ("Board"). The City is not opposed to a tall building on the development site but does not agree with certain aspects of the proposed development. The City takes the position that a 21-storey building, including a five-storey podium, would be appropriate on the development site.

[3] Prior to the hearing, the parties were able to resolve many outstanding issues in respect of the proposed development, including all issues with respect to the site plan and provisional consent. However, the following built form issues remained to be addressed specifically at the hearing: the setbacks, height and massing of the proposed tower and podium, primarily as they relate to the heritage building on the west side of Ontario Street opposite the development site.

[4] The Board heard evidence from three witnesses who were qualified to provide opinion evidence on behalf of the Applicants: Peter Smith, in the area of land use planning; Peter Clewes, in architecture and urban design; and Christopher Borgal, in heritage architecture and heritage planning. The City also called three witnesses who were qualified to provide opinion evidence: Henry Tang, in land use planning; Michael Sraga, in urban design; and Paul Maka, in heritage conservation and heritage planning. Also, Suzanne Kavanagh testified as a lay witness on behalf of the St. Lawrence Neighbourhood Association, which was granted participant status in this matter. Ms. Kavanagh supported the City's position with regard to this appeal and, in particular, requested that the height of the proposed tower and podium be lowered.

[5] Dream Office REIT (“Dream”), the owner of the office building adjacent to the development site to the south, was initially awarded party status in this matter at a prehearing conference but later withdrew, and a representative attended only to observe the proceedings.

SITE CONTEXT AND PROPOSAL

[6] The subject lands are located in the King-Parliament area of the City, south of Richmond Street East (“Richmond”) in the second block west of Parliament Street. The development site is on the east side of Ontario Street, approximately mid-block. Adjacent to the development site to the north, there are three 2½-storey row houses that contain both residential and office uses, north of which is a single-storey retail building at the southeast corner of Ontario Street and Richmond. Abutting the development site to the south is a seven-storey office building approximately 28.3 m in height, which steps down to a four-storey element that fronts onto Adelaide Street East (“Adelaide”) and has a single-storey warehouse at the rear. The Board heard evidence that Dream is considering some form of redevelopment of this property, and that the Applicants had worked with Dream to prepare a Block Study (filed as Exhibit 10) to analyze the entire block in order to ensure that there would be adequate tower-to-tower separation with respect to any future development.

[7] On the west side of Ontario, opposite the development site, there is a three to four-storey heritage building at 411 Richmond Street East (“Gendron building”), located at the southwest corner of Richmond and Ontario Street with frontage on both of these streets. The Gendron building, which was designed in 1895 and built for a manufacturer of baby carriages and rattan furniture, was designated as a heritage building on architectural and historical grounds in City By-law No. 351-83. The designating by-law states that “this corner building is a significant example of architectural design for turn-of-the-century industrial uses.”

[8] The Gendron building's frontage on Ontario Street extends south to Gendron Lane. Currently under construction just south of Gendron Lane are 19 and 21 storey residential buildings ("Axiom"), with respective heights of 68 m and 74 m, which include a podium of nine storeys (28.5 m in height), at the northwest corner of Ontario Street and Adelaide. To the west of the Gendron building on the south side of Richmond, there is a two-storey building on a property that has zoning approval for a 15-storey (69 m) office building that has not yet been built. It is part of an office development, known as Innovation Square, which includes two other office towers, with approved heights of 11 and 13 storeys. The proposed street wall along the south side of Richmond includes a "galleria" element of 22 m in height immediately adjacent to the west of the Gendron building and then steps down to 13.6 m and up to 26.2 m before it continues further west to taller heights.

[9] The subject lands are in the King-Parliament area east of the City's downtown core and subject to the 1996 King-Parliament Secondary Plan ("KPSP"), which has no density limitations and limited use restrictions in order to encourage mixed use, urban regeneration. There are a number of tall buildings in the King-Parliament area that have been recently built or approved, or are under construction, ranging in height from 15 to 26 storeys with taller towers proposed. Under the KPSP, the subject lands are within Regeneration Area 'A' (Jarvis-Parliament), an area targeted for significant growth. Both Richmond and Adelaide are major arterial roads, each with a right-of-way ("ROW") width of 20 m, and there is streetcar service along both King Street East and Queen Street East that connects with the Yonge-University subway line. Ontario Street, while classified as a local street, also has a 20 m ROW. The proposed downtown "relief line" subway would locate a transit stop approximately 350 m from the subject lands at Queen Street East and Sherbourne Street.

[10] As noted above, the Applicants propose an eight-storey podium, including a double height ground floor with a mezzanine at the back. The proposed 17-storey (including mechanical penthouse) tower would be set away from the street, providing for outdoor amenity space atop the podium. In his witness statement, Mr. Clewes

described the proposed podium design as a “contemporary interpretation of the 19th and early 20th century industrial fabric of the King-Parliament neighbourhood” and further stated that the “visual lightness and slenderness of the tower will create a striking addition to the King-Parliament skyline.” The Applicants propose a range of residential unit sizes, including three-bedroom and large two-bedroom units to provide family housing.

EVIDENCE, ANALYSIS AND FINDINGS

Heritage Impact

[11] A great deal of the evidence at the hearing related to the City’s concern that the proposed podium, at 25.7 m in height, would have a negative impact on the Gendron building. The primary evidence on this issue was received from Mr. Maka and Mr. Borgal.

[12] Mr. Maka, a senior heritage planner with the City, provided his opinion that the massing of the podium, which would be approximately double the height of the Gendron building, would have a negative visual impact. He stated that the proposed podium would dominate the streetscape and diminish the appearance of the Gendron building when experienced by a pedestrian at street level. In Mr. Maka’s opinion, the Heritage Impact Assessment (“HIA”) prepared in relation to the proposal had not demonstrated, to his satisfaction, that the heritage attributes of the Gendron building would be conserved. He said that further analysis was required as to how the proposed development would conserve the Gendron building, including conservation options or mitigation measures to address impacts.

[13] The Board notes that the City has new Official Plan (“OP”) heritage policies that were approved pursuant to a Board decision issued May 12, 2015, which approved Official Plan Amendment 199 (“OPA 199”) with modifications. Mr. Maka’s opinion was based on the OPA 199 heritage policies rather than the 2006 OP heritage policies. The parties advised that the OPA 199 heritage policies were not yet in force at the time of

the application for the proposed development. Counsel for both parties agreed that the policies in force at the time of the application were the 2006 OP heritage policies that preceded the OPA 199 policies. Counsel made additional submissions with respect to the OPA 199 policies and the *Clergy* principle, which are addressed below.

[14] It was Mr. Borgal's opinion that any impacts caused by the proposed development on the cultural heritage values, attributes and character of the Gendron building would be minimal and insignificant. He stated that the only visual impact of the proposed development would be shadows cast on the Gendron building, which would be transitory because the proposed tower would be thin from north to south. Mr. Borgal noted that these shadows would be cast during mid-morning hours at a time when the primary elevation of the Gendron building, facing north to Richmond, would also be in shadow.

[15] In Mr. Borgal's opinion, the proposed development would not make any changes to or physically touch the Gendron building because it is across the street, and would not obscure any views to or from the heritage building. He testified that the proposed podium would not be out of scale with the Gendron building, which itself has a large footprint and horizontal scale, and stated that the previous structure on the development site was also taller than the height of the heritage building. In Mr. Borgal's view, the heritage building can withstand the impact of significant development around it without significantly degrading the appreciation of it from the public realm because it is of a sufficient scale to allow it to stand on its own, even in the presence of the large developments already approved in the vicinity, including adjacent to it to the south and west. Mr. Borgal further stated that the proposed design of the podium would not be out of character with the surrounding area or have any negative impact on the Gendron building.

[16] In coming to his opinion, Mr. Borgal analyzed both the 2006 OP heritage policies and the OPA 199 policies. He prepared the HIA, which stated that, while OPA 199 was under appeal at that time, "it is reasonable to expect that its provisions will be applied to this current development." Within this context, the HIA concluded that the proposed development would have no physical impact on the heritage building.

[17] At the hearing, the Board heard argument concerning the proper application of the *Clergy* principle in this matter in relation to the two sets of OP heritage policies. Mark Crawford, counsel for the City, directed the Board to the Ontario Superior Court of Justice decision in *Beechridge Farms Inc. v. Ajax (Town)*, [2008] O.J. No. 447, referring to the application of the *Clergy* principle in the Board's *James Dick Construction* decision, which stated that new policy passed after an application had been commenced could be admissible and relevant, but not determinative. The Board in *James Dick Construction* further held that the Board may choose in its procedural discretion to consider and apply more modern standards that are consistent with a compelling public interest. Mr. Crawford emphasized that, in the matter before the Board in this proceeding, the Applicants were aware of the changing heritage policy regime because the City adopted the OPA 199 policies almost two years prior to the subject application and the provincial government approved them without modification 15 months before the application. He further noted that the HIA commented that it would be reasonable to expect that the OPA 199 provisions would be applied.

[18] The Board, however, sees no reason to deviate from the general approach of determining whether the proposal conforms to the OP provisions in force at the time of the application, while also having regard to the most recent indication of the direction of the City with respect to heritage planning. That is the approach taken by the Board below. As Mr. Crawford noted, the HIA did address the OPA 199 provisions, so the Board had evidence from both parties to assist it in having regard to these policies. The Board notes that, while the Applicants were aware of the adoption and approval of the OPA 199 policies, the status of those policies remained uncertain at the time of the application because they were under appeal to the Board.

[19] The 2006 OP heritage resources policies are found at s. 3.1.5. While Mr. Maka did not address the 2006 policies, Mr. Borgal reviewed these policies in the HIA attached to his witness statement and in his oral testimony, noting the requirement that development adjacent to properties on the City's Inventory of Heritage Properties will respect the scale, character and form of the heritage buildings (s. 3.1.5.2). Mr. Borgal stated that the HIA was prepared to demonstrate that the 2006 OP policies were being considered and implemented in an appropriate manner. He provided his opinion that the design of the proposed building has only negligible impact on adjacent heritage properties, including the Gendron building. The Board accepts Mr. Borgal's uncontradicted opinion evidence concerning the proposed development's conformity to the 2006 OP policies.

[20] In making this finding, the Board notes that Mr. Maka supported the approval of the Axiom development, which permitted a nine-storey, 28.5 m podium, just to the south of the Gendron building, with only Gendron Lane separating the buildings. In July 2015, Council approved the Axiom development, which was recommended for approval by City staff. Mr. Smith, in his testimony, described Gendron Lane as fairly narrow, while the proposed development site is on the opposite side of a 20 m wide street. Mr. Borgal testified that the Axiom development, being on the same side of Ontario Street and considerably higher than the Gendron building, would have a more significant visual impact on the heritage value of the Gendron building than the proposed development. Mr. Maka testified under cross-examination that he was satisfied that Axiom conformed to the 2006 OP heritage policies, while noting that the OPA 199 policies were not in effect at the time of the Axiom application.

[21] Both heritage planners provided evidence on the relevant OPA 199 policies, including s. 3.1.5.5, which provides as follows (with defined terms in italics):

Proposed *alterations*, development, and/or public works on or *adjacent* to, a property on the Heritage Register will ensure that the *integrity* of the heritage property's cultural heritage value and attributes will be retained, prior to work commencing on the property and to the satisfaction of the City. Where a Heritage Impact Assessment is required in Schedule 3 of the Official Plan, it will describe and assess the potential impacts and

mitigation strategies for the proposed *alteration*, development or public work.

[22] The OPA 199 policies go on to state, at s. 3.1.5.26, that “New construction on or *adjacent* to, a property on the Heritage Register will be designed to conserve the cultural heritage values, attributes and character of that property and to mitigate visual and physical impact on it.” The word “adjacent” is set out in the Definitions section of OPA 199 as meaning:

those lands adjoining a property on the Heritage Register or lands that are directly across from and near to a property on the Heritage Register and separated by land used as a private or public road...whose location has the potential to have an impact on a property on the Heritage Register....

[23] It was Mr. Maka’s opinion that the subject lands are adjacent to Gendron building as defined in the OPA 199 policies, and furthermore that the proposed development has not been designed to conserve the cultural heritage values, attributes and character of the Gendron building. He further directed the Board to s. 3.1.5.23 of OPA 199, which provides that a HIA will evaluate the impact of a proposed alteration to a property on the Heritage Register and/or to properties adjacent to a property on the Heritage Register, to the satisfaction of the City. Mr. Maka is of the opinion that the proposed development has not been satisfactorily evaluated to demonstrate that the heritage attributes of the Gendron building will be conserved.

[24] During cross-examination of Mr. Maka, it became apparent that he had included excerpts of certain provisions of OPA 199 from an earlier version of the policies, which were different from the version approved by the Board in its May 2015 decision. He maintained his opinion, however, that the proposed design would not mitigate the visual and physical impact of the proposed development on the Gendron building.

[25] Mr. Borgal, in his evaluation of the OPA 199 heritage policies, stated that great care had been taken to ensure the proposed development would be a good fit with the heritage context by stepping back the tower and through careful massing and articulation of the tower base. Regarding s. 3.1.5.5 and 3.1.5.26, it was his opinion that,

because the OPA 199 policies were not yet in force at the time of application, the Gendron building was not considered to be adjacent to the development site. Mr. Borgal reiterated his opinion that, even with the implementation of the change to the definition of “adjacent” in OPA 199, any impact of the new development on cultural heritage resources would be minimal and insignificant. In response to Mr. Maka’s view that the proposed development had not been satisfactorily evaluated in the HIA to demonstrate that the heritage attributes of the Gendron building will be conserved, Mr. Borgal offered his opinion that the HIA met the requirements of s. 3.1.5.23.

[26] Having had regard to the OPA 199 heritage policies, the Board prefers Mr. Borgal’s evidence that the proposed development complies with these policies and that the HIA appropriately assessed the relationship of the proposed podium to the Gendron Building. Mr. Maka did not provide a sufficient explanation as to how the proposed development failed to comply with these policies. The Board finds that Mr. Borgal, through the HIA, did assess the Gendron Building and described how its heritage values would be conserved by the proposed development. After reviewing all of the evidence, the Board is satisfied that, even if the definition of “adjacent” in OPA 199 is applied in evaluating the proposed development, the proposed development has been designed to conserve the cultural heritage values, attributes and character of the Gendron building and to mitigate visual and physical impacts on it. Therefore, the Board finds that the proposed development is in compliance with the OPA 199 heritage policies.

[27] The heritage planners provided opinion evidence on the KPSP, including s. 4.4, which states that new buildings should achieve a compatible relationship with heritage buildings in their context, including through consideration of such matters as building height, massing and scale. In Mr. Maka’s opinion, the proposed development would not achieve a compatible relationship with the massing and scale of the Gendron building because the proposed podium would be taller than the heritage building. Mr. Borgal provided his opinion, in his witness statement, that the development acknowledges the immediate context of its location through its design. He described how it has been designed to respond to its context as a building “of its own time and place”, which he

noted is consistent with the recommendations found in the Standards and Guidelines for the Conservation of Historic Places in Canada. The Board accepts Mr. Borgal's evidence on the KPSP, and is satisfied that the proposal will achieve a compatible relationship with the Gendron building and conforms to the KPSP.

[28] The Board also heard evidence concerning the City's March 2013 Tall Building Design Guidelines ("TBDG"). A Guiding Principle of the TBDG is to conserve and integrate adjacent heritage properties so that new buildings are sympathetic to, and compatible with, the heritage property. At s. 1.6(c), the TBDG sets out guidelines that apply when a tall building is adjacent to a lower-scale heritage building, including: designing new base buildings to respect the urban grain, scale, setbacks, proportions, visual relationships, topography and materials of the historic context; integrating the existing heritage character into the base building through high-quality, contemporary design cues; and providing additional tall buildings setbacks, stepbacks and other appropriate design measures to respect the heritage context.

[29] Mr. Maka provided his opinion that the proposed development does not meet the heritage guidelines in the TBDG because the proposed podium does not adequately respond to the Gendron building. In response, Mr. Borgal specifically addressed the criteria set out in s. 1.6(c). In his opinion: the design has been configured to respect the urban grain of the site by responding to existing buildings to the north and south; the scale of the proposed development is consistent with nearby and adjacent buildings from an earlier era; the tower is appropriately set back to provide a street frontage that respects past development and allows a reduced mass that does not conflict with the mass of the heritage building; there is no significant visual impact on the Gendron building; and the materials of the historical context are echoed in the proposed design of the new building, as described by Mr. Clewes.

[30] In closing argument, Mr. Crawford referred to the Board's decision in *CHC MPAR Church Holdings Inc. v. Toronto (City)*, 2015 CanLII 86941, in which the Board found, at para. 32, that City guidelines (including the TBDG) are not policy in the sense of OP

instruments, which are accorded greater weight, but do assist in implementing OP policies concerning tall buildings and help to translate the OP directions into desired outcomes for the design of buildings and the conservation of heritage resources. Mr. Crawford further cited *Dundas Residences Inc.*, issued July 21, 2015 (Board Case No. PL141461), in which the Board stated that the TBDG inform the OP's built form policies and assist in their implementation, and should not be ignored, dismissed or downplayed (para. 52). Having considered evidence before it concerning the TBDG, the Board is satisfied with Mr. Borgal's evidence as to how the proposed development has been designed in accordance with the guidelines relating to heritage properties, and finds that the TBDG are met.

[31] Regarding the heritage conservation of the Gendron building, the Board has carefully reviewed all of the evidence concerning the applicable provincial legislative and policy provisions, including s. 2(d) of the *Planning Act* ("Act"), s. 1.7.1 (d) and 2.6.3 of the Provincial Policy Statement, 2014 ("PPS"), and s. 4.2.4.1(e) of the Growth Plan for the Greater Golden Horseshoe, 2006 ("Growth Plan"). After weighing the evidence on these provisions, the Board prefers Mr. Borgal's opinion evidence, for the reasons already set out above, and finds that the proposal has appropriate regard for the matters of provincial interest in s. 2(d) of the Act, is consistent with the heritage provisions in the PPS and conforms to those of the Growth Plan.

[32] In summary, the Board is satisfied that the massing of the proposed development, including the podium, will not have any adverse impacts on the heritage conservation of the Gendron building. The Board finds that the proposed development has been designed to conserve the cultural heritage values, attributes and character of the Gendron building and mitigate visual and physical impact on it, and that it has been satisfactorily evaluated through the HIA to demonstrate that its heritage attributes will be conserved.

Additional Podium and Tower Height Issues

[33] In addition to its relationship to the Gendron building, the City also raised a concern about the height of the proposed podium in relation to the row houses to the north of the development site on the east side of Ontario Street. In Mr. Sruga's opinion, the proposed podium would have a canyon effect that would create an inhospitable public realm environment along the street. He stated that a podium with a lower building height at the north end transitioning to a taller height at the south end of the development site would result in an improved pedestrian environment on Ontario Street, noting that the lowered height would reduce the negative visual impact of the proposed blank north-facing party wall. In support of his opinion, Mr. Sruga reviewed the applicable provisions of the KPSP and TBDG.

[34] Mr. Tang also stated that the proposed podium height of 25.7 m would not be compatible with the scale of the row houses to the north, and that podium height should not be determined based on the height of the office building to the south. He referred to provisions from the OP, KPSP and TBDG, emphasizing that s. 3.1.2.3 of the OP requires new development to be massed to frame adjacent streets in a way that respects the existing and/or planned street proportion and to create appropriate transitions in scale to neighbouring existing and planned buildings. Mr. Tang also noted that s. 3.1.1 b) of the TBDG states that a base building height of 80% of the adjacent street ROW should be provided along streets without a consistent street wall. In his opinion, the block of Ontario Street in which the development site is located does not have a consistent street wall and he therefore recommended that the podium should have a height of 16 m, or 80% of the ROW. It was Mr. Tang's opinion that the 28.3 m height of the seven-storey office building adjacent to the development site to the south should not be the only reference point for determining height. He noted that a recommendation that the base building be lowered came from the Design Review Panel that assessed the proposed development.

[35] Mr. Tang further stated that the overall tower height proposed was not appropriate, noting OP policies that speak to the existing and planned context of the development site, as well as KPSP policies concerning the physical character of the King-Parliament area. He provided his opinion that there is a building height transition from greater heights near Jarvis Street to the west, to lesser heights around Parliament Street to the east, and stated that recently constructed or approved developments in the vicinity of the subject property range from 19 to 22 storeys. Mr. Tang said that the proposed tower height of 78.9 m would be at least 9 m over the prevailing approved tall building heights of the area, and recommended a height of 69.1 m for the proposed development.

[36] In response to the City's concerns about the podium height, Mr. Smith provided his opinion that the proposed height is appropriate and has regard to the existing and planned context which includes the seven-storey office building adjacent to the south of the development site and the Axiom street wall, as well as an eight-storey, 28.5 m streetwall recommended for approval by City staff as part of a proposed development at 25 Ontario Street. He observed that the final City staff report recommending approval of the Axiom development made the statement that "the base building heights are consistent with the height and massing of the surrounding developments and reinforce the existing street wall in the area."

[37] Mr. Smith further noted that the three 2½-storey row houses immediately to the north of the development site are part of the existing context but not part of the planned context. He testified that because they are in the Regeneration Area, they are likely to be redeveloped in the future as a midrise building, which would relate well to the proposed podium height on the development site. It was Mr. Smith's opinion that the planned context should be the most relevant factor in determining podium height of the proposed development. While the proposal calls for a seven-storey blank north-facing party wall until such time as there is redevelopment to the north, Mr. Smith noted the evidence of Mr. Clewes concerning the plans to add visual interest to the blank wall

through the use of design details in the form of brick cladding with vertical and horizontal joints.

[38] Regarding the proposed tower height, Mr. Smith stated his opinion that it would fit harmoniously with the range of existing and approved heights in the area, which generally range from 15-26 storeys, commenting that there is no discernable pattern. He noted that Mr. Tang, in saying that the proposed development would be taller than other buildings in the area, did not include several towers in the surrounding area, under construction or approved, of various heights ranging from 83.5 m to 91.5 m. Noting the relationship of the proposed development to the height of a building under construction at 93-95 Berkeley Street/112-124 Parliament Street in the block to the east, which will have a height of 74.85 m to the top of its mechanical penthouse, Mr. Smith was of the opinion that the height of the proposed building would fit within the existing and planned context of a height transition from west to east.

[39] The Board has considered the evidence received on these issues, including the visual evidence provided relating to tower and podium heights, as well as renderings of the proposed development relative to nearby buildings. Having reviewed the evidence, the Board prefers the evidence of Mr. Smith over that of Mr. Sraga and Mr. Tang. Given the development activity in the King-Parliament area because it is a Regeneration Area, the planned context in this matter is significant. The Board accepts Mr. Smith's evidence that redevelopment of the row houses to the north is likely to occur in the intensified form of a midrise building similar in height to the podium height proposed for the development site. In the meantime, the Board is satisfied that the proposed design for the blank north-facing party wall will provide a visually interesting surface until such time as that redevelopment occurs.

[40] The Board is further persuaded by the fact that City staff recommended approval of the Axiom development on the basis that its nine-storey podium of 28.5 m in height would be consistent with the height and massing of developments in that area, and would reinforce the existing street wall. Regarding the comments of the Design Review

Panel, the Board accepts the argument put forward by Kim Kovar, counsel for the Applicants, that no weight should be placed on the minutes of the Panel meeting, which do not state which panel members (some of whom appear not to be architects) made the comments, given that no one from the Panel was called as a witness in this proceeding. Therefore, the Board finds that the proposed podium height is appropriate and conforms to the applicable policies.

[41] The Board is also satisfied the proposed tower height is appropriate on the basis of Mr. Smith's opinion that the proposal would fit with the range of existing and approved heights in the area. The Board observes that there is not a straightforward transition of higher towers in the west to lower towers in the east, as suggested by Mr. Tang. Instead, to the west of the development site in the King-Parliament area, the Board notes that there are towers at heights of 15 and 17 storeys to the west of towers, which are built or under construction, of 19, 21 and 22 storeys. The Board finds the proposed tower height to be in conformity to the policies that govern the proposal.

Setbacks and Separation Distances

[42] Mr. Tang raised concerns about the proposed setbacks and separation distances from potential future development. He noted s. 3.2.3 of the TBDG, which states that the tower component of tall building proposals should provide a minimum of 12.5 m from the side and rear property lines. Mr. Tang provided his opinion that, while the proposed tower stepback of 10 m to the north is appropriate, the tower stepbacks of 10 m to the south property line and 6.3 m to the east property line are not appropriate. He stated that these stepbacks would not provide for adequate sky view between buildings, privacy for residents and access to natural light in the building interior. It was also Mr. Tang's opinion that the Block Study prepared by the Applicants did not adequately ensure that the development rights for neighbouring sites within the block would be retained. He said that he did not oppose a tall building on the development site, but said that the proposed tower should be shifted north to provide for a setback of 12.5 m to the south.

[43] Furthermore, Mr. Tang did not support the proposed 0.69 m podium setback to the south property line, beyond 25 m from Ontario Street, or the proposed 0.04 m podium setback to the east property line. In his opinion, the proposed massing would not conform to the OP or KPSP policies in relation to the existing and/or planned context, and would not provide adequate separation distance to allow for adequate sky view, privacy and access to natural light. Mr. Tang also stated that the proposed podium setbacks would force any redevelopment of the lands to the south and the east to provide for a building setback to the shared property line greater than 7.5 m in order to achieve a 15 m separation distance.

[44] In Mr. Smith's opinion, the tower setbacks of 10 m to the south and north property lines and 6.3 m to the east property line are all appropriate and sufficient in relation to any future development on the block. He stated that there would be no tower separation issues along the eastern face of the proposed tower because the properties to the immediate east currently consist of a surface parking lot and the retained portion of the single-storey building at 102 Berkeley Street and, given the policies relating to the preservation of the scale and character along Berkeley Street, these properties are likely to be redeveloped for a mid-rise building rather than a tall building. Mr. Smith further stated that a tall building could be developed on the property to the south because of its size, which would give sufficient flexibility to locate a tower close to the Adelaide frontage and provide a separation distance of 25 m, based on the Block Study analysis.

[45] Mr. Smith also addressed the proposed podium setbacks of 0.69 m to the south property line beyond 25 m from Ontario Street and 0.04 m to the east property line. He offered his opinion that the portions of the podium along the south and east property lines would have blank walls and no south-facing or east-facing windows, and would result in no light, view or privacy impacts on the adjacent property.

[46] With respect to the issues raised concerning the tower and podium setbacks, the Board prefers the evidence of Mr. Smith. The Board notes that the TBDG, at p. 12,

address how and where the guidelines apply, stating at paragraph iv. that they “are intended to provide a degree of certainty and clarity of common interpretation, however, as guidelines, they should also be afforded some flexibility in application, particularly when looked at cumulatively.” Having reviewed the Block Study prepared in cooperation with the owner of the adjacent property to the south, the Board is satisfied with respect to both the tower and podium setbacks proposed that intent of the TBDG is met. The Board accepts, on the basis of the Block Study analysis, that the proposed development would not unreasonably preclude opportunities for tall and midrise buildings to be located on adjacent properties to the south, east and southeast of the development site, with appropriate tower separation. Regarding the City’s concerns about sky view, privacy and access to natural light in relation to the proposed tower and podium setbacks, the Board finds that these conditions will be maintained by the proposed development due to appropriate tower separation and the proposed blank podium walls, as stated by Mr. Smith.

Conclusion

[47] Based on its review of all of the evidence, the Board finds that the proposed development, overall, is consistent with the policies of the PPS, conforms to the relevant policies of the Growth Plan, the OP and the KPSP, and complies with the intent of the TBDG.

[48] Therefore, the Board approves in principle the draft amendments to Zoning By-law No. 438-86, filed as Exhibit 17, and to Zoning By-law No. 569-2013, filed as Exhibit 18. The Board also grants site plan approval with respect to the architectural drawings in Exhibit 4 and the landscape drawings in Exhibit 5, subject to the approval conditions filed as Exhibit 19. The Board is satisfied that the draft approval conditions are reasonable and appropriate.

[49] The parties requested, should the Board approve the proposed zoning by-law amendments, that the Board withhold its final Order with respect to the zoning by-law amendments until the Board has been advised that the parties have executed a s. 37 agreement and the Board has been provided with the final form of the zoning by-law amendments. The parties also requested that the Board withhold its final Order on site plan approval until the site plan preapproval conditions in Exhibit 19 have been satisfied and a final Functional Servicing Report has been submitted to the satisfaction of the City's engineering and construction services department. As set out below, the Board grants these requests.

[50] The Board now turns to the proposed provisional consent. The applicable criteria for granting consent are outlined in the Act. Under s. 53(1), a consent may be given where a plan of subdivision is not required, and s. 53(12) refers to the criteria in s. 51(24). The relevant criteria in this matter were addressed in evidence at the hearing and Mr. Smith provided his uncontradicted planning opinion that these criteria have been met and, subject to the conditions set out in Exhibit 20 (appended as Attachment 1), the proposed provisional consent is appropriate. Based on the evidence, the Board finds that the proposed provisional consent satisfies the relevant s. 51(24) criteria and a plan of subdivision is not required. The Board further finds that it is appropriate to attach the conditions set out in Attachment 1 to the provisional consent.

ORDER

[51] The Board orders that:

1. The appeals are allowed.
2. The provisional consent is to be given subject to the consent approval conditions set out in Attachment 1 to this Order.

3. Pursuant to s. 51(56.1) of the *Planning Act*, the City of Toronto shall have the authority to clear the consent approval conditions and to administer final approval for the purposes of s. 51(58) of the *Planning Act*.

[52] The final Order with respect to the zoning by-law amendments is withheld until the Board is advised that the parties have executed a s. 37 agreement and is provided with the final form of the zoning by-law amendments.

[53] The final Order on site plan approval is withheld until the Board is advised that the site plan preapproval conditions in Exhibit 19 have been satisfied and a final Functional Servicing Report has been submitted to the satisfaction of the City's engineering and construction services department.

"M. Carter-Whitney"

M. CARTER-WHITNEY
MEMBER

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

Ontario Municipal Board

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

ATTACHMENT 1

**CONDITIONS OF APPROVAL
CONSENT APPLICATION
MUNICIPAL FILE NUMBER B0010/16TEY**

- (1) Confirmation of payment of outstanding taxes to the satisfaction of Revenue Services Division, Finance Department.
- (2) **Two copies of the registered reference plan of survey** integrated to NAD 83 CSRS (3 degree Modified Transverse Mercator projection), delineating by separate Parts the land and their respective areas, shall be filed with the Manager of Land and Property Surveys, Engineering Services, Engineering and Construction Services.
- (3) **Two copies of the registered reference plan of survey** satisfying the requirements of the Manager of Land and Property Surveys, Engineering Services, Engineering and Construction Services.
- (4) Within **ONE YEAR** of the date of the giving of this notice of decision, the applicant shall comply with the above-noted conditions and prepare for electronic submissions to the Deputy Secretary-Treasurer, the Certificate of Official, Form 2 or 4, O. Reg. 197/96, referencing either subsection 50(3) or (5) or subsection 53(42) of the *Planning Act* as it pertains to the conveyed land and/or consent transaction.