

Local Planning Appeal Tribunal
Tribunal d'appel de l'aménagement
local



ISSUE DATE: February 19, 2020

CASE NO(S): PL180557

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PROCEEDING COMMENCED UNDER subsection 34(19) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant:	Action Sandy Hill
Subject:	By-law No. BL 2018-154
Municipality:	City of Ottawa
OMB Case No.:	PL180557
OMB File No.:	PL180557
OMB Case Name:	Action Sandy Hill v. Ottawa (City)

Heard: September 26, 2019 in Ottawa, Ontario

APPEARANCES:

Parties

Counsel*/Representative

City of Ottawa (“City”)

Garrett Schromm*

Action Sandy Hill (“Appellant”)

François Bregha

DECISION DELIVERED BY DAVID L. LANTHIER AND ORDER OF THE TRIBUNAL

INTRODUCTION

[1] This final decision determines an appeal which was heard, by oral hearing, pursuant to s. 38(1) of the *Local Planning Appeals Tribunal Act* (“LPATA”) as it read

before the effective date that the *More Homes, More Choice Act, 2019* came into force on September 3, 2019. The form and manner of the hearing was directed following the Case Management Conference (“CMC”) held on November 14, 2018 and the Decision, Order, and directives subsequently issued by the Tribunal.

[2] This Appeal before the Tribunal (the “Appeal”) has been brought pursuant to s. 34(19) of the *Planning Act* (“Act”) wherein the Appellant appealed By-law No. 2018-154 passed by Council on May 9, 2018, (the “ZBLA”). That instrument approved an amendment of Zoning By-law No. 2008-250, site-specific to the subject property located at 231 Cobourg Street (“Property”), used by the Government of Uganda as its embassy office in Canada.

BACKGROUND AND THE NATURE OF THE ZBLA UNDER APPEAL

[3] The background to the Application and the Appeal is not in dispute. The Ugandan High Commission Office (“Applicant”), as the registered owner of the Property, applied to the City for a zoning amendment which would maintain the existing permitted residential use but add the permitted use of an office, limited to an embassy. The Ugandan High Commission had used and occupied the Property as its embassy location from 1985 through to 2014, when it was required to seek occupancy elsewhere due to the deteriorated condition of its Commission premises, with the intention of pursuing improvements and continuing its use.

[4] The ZBLA provides for a defined exception for permitted use for an “office limited to an embassy” and allows for a number of site-specific zoning standards to permit the proposed construction and renovations to the Subject Property.

[5] Concurrently with the application for the ZBLA, the Applicant also made application for a Demolition Permit and approval of the construction plans and Heritage Approval to permit the removal and replacement of the existing structure on the Property. As discussed below, the Record clearly indicates that the process of public consultation, debate, the preparation of the Cultural Heritage Impact Statement and the

review and consideration of the applications by the Built Heritage Sub-Committee and by Planning and Heritage Staff were all undertaken as part of the processes leading to the eventual recommendations of the Planning Committee to Council. The Tribunal notes, in reviewing the Record, that there were some voices raised in opposition during the deliberations in those processes, including those of the Appellant. Ultimately the City exercised its mandate to make determinations on these heritage matters which obviously differ from the views of the Appellant.

[6] The heritage approval and demolition permit were granted by Council and issued on May 9, 2018.

[7] The issuance of the Heritage approval and demolition permit by the City are not matters which are before the Tribunal in this Appeal.

THE STATUTORY BASIS FOR THE APPEAL

[8] The Appeal of the decision of Council approving the ZBLA is brought under s. 34(19) of the Act as it was amended by Bill 139. As the Act was thereafter amended by Bill 108, and as the Transition Regulations of both the Act and LPATA were enacted, this Appeal, having been scheduled for a hearing, was continued and heard as both the Act and LPATA read before September 3, 2019.

[9] The narrowed basis for an appeal under this section is set out in s. 34(19.0.1) of the Act, which provides as follows:

Basis for appeal

(19.0.1) An appeal under subsection (19) may only be made on the basis that the by-law is inconsistent with a policy statement issued under subsection 3 (1), fails to conform with or conflicts with a provincial plan or fails to conform with an applicable official plan.

[10] Under s. 34(26) of the Act if the Appellant fails to establish to the Tribunal that the ZBLA fails to meet the consistency and conformity requirements set out in the legislation, the Tribunal must dismiss the Appeal and the decision of Council enacting

the ZBLA is in effect.

[11] Section 34(26.2) of the Act applies if the Appellant succeeds in its Appeal, and reads as follows:

Same — appeal under subs. (19)

(26.2) Unless subsection (26.3), (26.8) or (26.9) applies, if, on an appeal under subsection (19), the Tribunal determines that a part of the by-law to which the notice of appeal relates is inconsistent with a policy statement issued under subsection 3 (1), fails to conform with or conflicts with a provincial plan or fails to conform with an applicable official plan,

- (a) the Tribunal shall repeal that part of the by-law; and
- (b) the Tribunal shall notify the clerk of the municipality that it is being given an opportunity to make a new decision in respect of the matter.

[12] Under the provisions of the Act, the Tribunal does not have the authority “not to approve” the ZBLA as a final order. Instead, if the appeal is successful, the Tribunal must send the ZBLA back to the municipal council to make a new decision.

CONSISTENCY AND CONFORMITY

[13] For those planning appeals brought before the Tribunal under the Bill 139 amendments to the Act, the focus of the appeal is centered upon matters of consistency and conformity as applicable to the grounds set out in the Appeal. As the Tribunal has indicated elsewhere, in appeals such as this one, hearings are no longer conducted as fresh hearings upon new evidence involving a broad, multi-faceted examination of “good planning”, including considerations of consistency and conformity.

[14] Instead, appeals under Bill 139 now involve an examination of the existing record of planning documentation and information that was before the authority that made the planning decision and the limited exercise of those additional powers of inquiry granted to the Tribunal under Part VI of the LPATA. The Tribunal is to determine only whether the instrument, or portions of the instrument, under appeal is consistent with the Provincial Policy Statement 2014 (“PPS”), conforms to provincial plans, and, where

applicable, conforms with an official plan.

[15] The Tribunal must also have regard for matters of Provincial Policy and, in accordance with s. 2.1 of the Act, regard to the decision of Council. In that respect, the Tribunal must have regard for the decision as it passed the ZBLA but as well, the manner in which Council considered the information and documents before them. In this case this includes the concurrent application for a Demolition Permit granted by the City and the Heritage Approval to permit the removal and replacement of the existing structure on the Property. The Tribunal's requirement to have regard to the decision of Council is recognized to exist in the context of one of the stated purposes set out in s. 1.1 of the Act, which is to recognize the decision-making authority and accountability of municipal councils in planning.

HEARING

[16] The Applicant did not request party status or appear at this hearing. No other person or entity requested status as a Participant or Party.

[17] The Tribunal received oral submissions from the Appellant and the City, and has considered the municipal record inclusive of the audio recording of the meeting of the Planning Committee, the Appellant's and City's respective Appeal Records, and all materials filed in this Appeal. Collectively, this forms the "Record" considered by the Tribunal in this Appeal.

[18] The Record includes the sworn affidavit of Simon M. Deiacco, which is supported by Mr. Deiacco's Curriculum Vitae and executed Acknowledgement of Experts Duty. Mr. Deiacco's planning evidence, as an expert so qualified by the Tribunal upon review of the submitted material, is uncontradicted by any planning evidence from the Appellant on the issues before the Tribunal, remains the only planning opinions for consideration by the Tribunal.

[19] This final dispositive Decision and Order on the merits of the Appeal now issues

pursuant to s. 31(1) of the LPATA. Upon the evidentiary Record presented to the Tribunal, and after considering the submissions of the Parties, for the reasons set out below, the Appeal is dismissed.

ISSUES

[20] The issues were canvassed and confirmed by the Tribunal at the CMC. The Appellant's issues, as they have been identified in the Appeal Form, and expanded upon by the Appellant's Synopsis are:

- (a) Whether the ZBLA, as it:
 - (i) permits an increase in parking spaces,
 - (ii) allows for additional permitted office uses limited to an embassy which may then result in an institutional built-form instead of the prevalent residential style and character of dwellings in the Heritage Conservation District, and
 - (iii) allows for the non-application of the s. 60 heritage overlay provisions in the zoning by-law,is consistent with the PPS and conform to the City's Official Plan ("OP") and applicable Secondary Plan
- (b) The extent to which the asserted facts and evidence relating to heritage, heritage character, heritage value and significance, heritage remediation and the sufficiency of heritage assessment of the existing dwelling, (as such issues and concerns are set out in subparagraphs 1 (a) to (g) in Section B of the Appellant's Synopsis) are, or are not, appropriate and relevant to the determination of the test of consistency and conformity with respect to these three aspects of the ZBLA remains to be determined by the Tribunal in the hearing of the Appeal.

[21] As the Tribunal has confirmed below in its analysis, the approvals under the *Heritage Act* applications have already been provided to the Applicant and the heritage permits for the demolition and demolition have already been issued. Those matters, and any issues raised by the Appellant in relation to such heritage approvals and permits, are not therefore relevant in this Appeal. The only limited question remains, as

indicated, whether matters of heritage are brought into play in consideration of consistency and conformity.

[22] By process of elimination, the implementation of the other performance standards set out in the ZBLA relating to height, setback, and minimum lot area and width, which are not raised in the Appellant's appeal, are not at issue in the hearing of this Appeal

[23] As the Tribunal has previously determined, the Appellant's concern that the demolition of the existing structure sets a "dangerous precedent" as described in subparagraphs 1(h), (i) and (j) in Section B of the Appellant's Synopsis is not a proper issue before the Tribunal under s. 34(19.0.1) of the *Planning Act* since the issuance of the demolition permit is not an issue before the Tribunal and such a concern does not relate to the tests of consistency and conformity of the ZBLA.

ANALYSIS AND FINDINGS OF THE TRIBUNAL

Grounds and Issues Relating to Heritage

[24] Much of the Appellant's objections to the ZBLA relate to matters of heritage. Of the twelve enumerated grounds set out in the Appeal form, ten relate to heritage approvals relating to the demolition and proposed construction.

[25] The Appeal Form, the Appellant's Case Synopsis, and oral submissions to the Tribunal substantially focus on matters of heritage. In a rather fervent and well-informed fashion the Appellant has provided the Tribunal with a compelling heritage and historical background to the building on the Property. The Property, as it exists within the Sandy Hill neighbourhood in the Wilbrod/Laurier Heritage Conservation District, was home to many politicians and senior civil servants, including four Prime Ministers of Canada. Notably, the home on the Property was the residence of Lester B. Pearson before he became Prime Minister, and when he was awarded his Nobel Peace Prize. The historical connective threads that tie Prime Minister Pearson to the Property are more fully particularized in the Appellant's materials in the Record, and to a lesser extent, the architectural heritage attributes identified by the Appellant.

[26] Against this background the Appellant has raised concerns about the practice of “demolition by neglect” – arguments that were already advanced during the public consultation processes that led to the final determinations on heritage issues. The Appellant is concerned that the demolition and construction approvals will validate the wilful neglect of a heritage valued structure as a convenient means to press for replacement of structures whose integrity has been compromised over time. The Appellant’s concerns also include matters of precedent as this reconstruction might signal the means for other foreign missions to secure demolition and reconstruction of other heritage properties.

[27] While all of this background, and these heritage concerns, are undeniably compelling and impassioned, the Tribunal is required to assume a reasoned and non-impassionate approach to, and analysis of, the issues that are before it in this Appeal of the ZBLA. As the Tribunal is required to determine only the issues of consistency and conformity, if finds that such matters of heritage, heritage character, heritage value and significance, heritage remediation and the sufficiency of heritage assessment of the existing dwelling on the Property, and larger policies of demolition by neglect and precedent, as they have been presented and argued by the Appellant, are not matters that are relevant to the issues in the appeal of the ZBLA.

[28] On the Record, the applications for both the approval of the demolition of the building and the new construction on the Subject Property, under Part V of the *Ontario Heritage Act*, and matters relating to the heritage approvals and permits for both construction and demolition, have been fully canvassed, debated, and considered by the Built Heritage Sub-Committee, Planning Committee and ultimately City Council. The Applications have been approved and the heritage permits for the demolition and the construction have long ago been issued.

[29] The Record confirms that the City, through its processes of public consultation, review by Planning and Heritage Staff and the City’s Built Heritage Sub-Committee and its Council, has fully deliberated and then exercised its statutory authority in considering all such matters relating to heritage including the differences of opinion expressed by

some Councillors, the Appellant, and members of the Built Heritage Sub-Committee. The Tribunal's review of the Record has included careful consideration of approximately 1 hour and 35 minutes of audio recording of the Planning Committee meeting devoted to the application for demolition and approval of the proposed construction and the ZBLA, as well as the various written reports and material. The Record is indicative of the involved debate and determinations relating to heritage matters, that led to the determination of both those heritage matters that are not before the Tribunal, as well as the ZBLA passed by Council that is the subject of this Appeal.

[30] The fact that the views of the Appellant on these heritage matters did not prevail, does not, in and of itself, amount to non-conformity with the heritage policies contained within the OP or Secondary Plan or to inconsistency with the cultural heritage policies of the PPS. There is no persuasive evidence within the Record to suggest that the expressed views of the Planning Committee as put forward and accepted by Council on matters relating to heritage amount to such non-conformity or inconsistency.

[31] In regards to heritage, the Tribunal finds that it has no jurisdiction to "second-guess" these determinations and decisions resulting in the approval of those heritage demolition and construction applications or the issuance of the related permits. The Tribunal concurs with the City's reliance upon the conclusion of the Divisional Court in *Bridgepoint Health v. Toronto (City)*, 2007 CarswellOnt 4103 that the Board/Tribunal has no ability under its legislated powers to make *Heritage Act* designations with respect to properties or to "second-guess" the determinations of Council on such heritage matters.

[32] Further, on an appeal under s. 34(19), the Tribunal clearly has no authority to scrutinize the reasons behind the heritage approvals granted for the proposed demolition, construction or to alter those decisions of Council to approve. To do so, as the Appellant has urged, would result in the Tribunal assuming a type of appellate jurisdiction over the decision-making authority granted to the City Council in relation to such heritage matters and the decision already made on these issues. The Tribunal has no such jurisdiction as such applications are brought before the City and decided by

Council under the *Ontario Heritage Act*. With respect to the issuance of permits, only the owner of the lands which are the subject matter of a demolition and construction permit may appeal the decisions of council. No such appeal has been brought.

[33] In summary, it is the view of the Tribunal that most of the grounds, upon which the Appellant is challenging the ZBLA, would urge the Tribunal to substitute its views for the decision of Council on these heritage matters, under the guise of concerns of non-conformity with the City's OP and Secondary Plan and inconsistency with the PPS. The Tribunal is required to have regard for the decisions of Council that have been made, and to restrict its examination to matters of consistency and conformity under s. 34(19) of the Act. The Tribunal cannot stray into the already determined matters relating to heritage, over which the Tribunal clearly has no jurisdiction.

[34] The Tribunal accordingly finds that all of those grounds of Appeal and issues raised in relation to heritage matters decided in respect of the Property do not constitute valid grounds for Appeal of the ZBLA.

Increase in Parking

[35] The Appellant has raised apprehensions regarding parking.

[36] Mr. Deiacco has addressed matters of parking and traffic as it relates to the Urban Design and Compatibility policies of the City OP and is of the opinion that aside from those matters which might be addressed in the Site Plan (which is not before the Tribunal) there is no basis to suggest that the ZBLA, as it will permit the redevelopment of the Subject Property will result in any undue adverse impacts.

[37] As the Record has been reviewed, including the planning evidence provided on this issue as raised by the Appellant, and in the absence of any real concerns relating to non-conformity with the City OP expressed by the Appellant (beyond mere apprehensions as to parking) the Tribunal finds that there is no basis for this aspect of the Appellant's Appeal.

[38] Specifically the Tribunal finds that the ZBLA conforms to the Urban Design and

Compatibility policies of the City OP.

Concerns over Use As an Office

[39] The Appellant argues that the rezoning of the Subject Property under the ZBLA is problematic because this is inconsistent with the “purely residential nature” of the Conservation District and as an exclusively commercial office building, it will not fit within the residential character of the neighbourhood.

[40] The Appellant’s basis for this aspect of the appeal is not supported by any planning evidence. Neither does the Appellant’s ground, in this respect, suggest that the ZBLA is inconsistent with the PPS or fails to conform with the OP.

[41] Mr. Deiacco has considered section 1.1 of the PPS and concludes that by maintaining the base use of a residence, plus an embassy office, the ZBLA is consistent with the PPS as it accommodates an appropriate range and mix of residential, employment and other uses to meet long-term needs for healthy, liveable and safe communities. In the absence of any evidence within the Record to support the Appellant’s general assertion of inconsistency, the Tribunal cannot conclude that the ZBLA, as it permits the office, limited to an embassy, is inconsistent with the PPS.

[42] The Property remains zoned as residential. As the City OP, in the General Urban Area, permits a full range of uses, including non-residential uses, Mr. Deiacco concludes that the ZBLA fully conforms with the applicable land use policies of the Official Plan and the Sandy Hill Secondary Plan. In relation to the ZBLA provisions as to use of the Property, the Appellant has failed to direct the Tribunal to any specific policy in the OP or the Secondary Plan to which the ZBLA does not conform.

[43] The Tribunal accordingly finds that the ZBLA, as it has identified the permitted use of the Subject Property in its zone, is in conformity with the City’s OP and the Secondary Plan and is consistent with the PPS.

Inconsistency with the Heritage Overlay – Section 60 of the City Zoning By-Law

[44] The Appellant asserts that the ZBLA is inconsistent with the Heritage Overlay provision set out in section 6 of the City's Zoning By-law which speaks to encouraging the retention of existing heritage buildings by offering zoning incentives to reuse buildings and limit size and location to preserve heritage character of the original building.

[45] For the reasons indicated, the Tribunal is satisfied that considerations relating to heritage matters, on the Record have been thoroughly determined by City Planning and Heritage Staff, Planning Committee and Council, including considerations of size and location, massing, scale, and the protection of heritage character.

[46] An issue of inconsistency of the ZBLA with the City's Zoning By-law is not a valid basis for an appeal under s. 34(19) of the *Act*, and is unrelated to matters of consistency with the PPS or conformity with the OP or a Secondary Plan.

[47] Moreover the ZBLA will, itself, eliminate any question of inconsistency with the ZBLA through the amendment as it plainly provides, in Table V, that section 60 does not apply to the construction of a new office building limited to an embassy. Again, this is based on the thorough consideration of the Planning Committee and Council to the heritage issues and concerns raised in the course of the review of all of the applications.

[48] The Tribunal therefore finds that the Appellant's grounds and issues, as raised in relation to section 60 of the City's Heritage Overlay do not represent valid issues relating to the consistency of the ZBLA with the PPS, or conformity with the OP and Secondary Plan in this Appeal.

Overall Planning Evidence

[49] The uncontroverted planning opinion evidence provided by Mr. Deiacco is that, in all respects, and for the reasons set out in his Affidavit at Tab 8 of the Responding Appeal Record, the ZBLA is consistent with the applicable policies of the PPS and conforms with the applicable land use policies of the Official Plan and the Secondary

Plan. Mr. Deiacco also opines that the ZBLA conforms with the policies of the Wilbrod/Laurier Heritage Conservation District Plan. This planning evidence is unchallenged by any other qualified land use planner, and is accepted by the Tribunal as it accords with the Record before the Tribunal.

SUMMARY AND CONCLUSION

[50] The Tribunal has had regard for the decisions of Council and the manner in which Council considered the information and documents before them. In this case this relates to the decision that Council made in relation to the ZBLA.

[51] Although the Tribunal is not called upon, nor able, to consider the heritage applications, to the extent that the application for the ZBLA was intertwined with the concurrent applications for a Demolition Permit granted by the City and the Heritage Approval to permit the removal and replacement of the existing structure on the Property the Tribunal has also practically had regard for these decisions contained within the Record. Given the manner in which the issues have been raised by the Appellant within this Appeal, that regard for those decisions relating to heritage has guided the Tribunal in its analysis and determination that these decisions on heritage must remain undisturbed and have no relevancy in the matters of consistency and conformity in relation to the ZBLA.

[52] This approach serves to recognize the decision-making authority and accountability of municipal councils in planning. In the context of this Appeal, as advanced by the Appellant, it also, in that process, serves to underscore the decision-making authority of municipal councils on those matters provided for under the *Heritage Act*.

[53] Having examined the Record presented in this appeal and the evidence contained therein, and having carefully considered all of the written submissions of the Appellant and the City, as contained in the Case Synopses and the Appeal Records filed, and the oral argument in support of the respective positions of the parties the

Tribunal concludes, in all respects, that the Appellant has failed to demonstrate that the ZBLA that is the subject matter of this Appeal, in any way is inconsistent with the PPS, or fails to conform with the City OP, the Secondary Plan or the applicable Heritage Conservation District Plan.

[54] Upon the findings made, and for the reasons given, the Appeal must be dismissed.

ORDER

[55] The Tribunal orders that the Appeal is dismissed.

“David L. Lanthier”

DAVID L. LANTHIER
MEMBER

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

Local Planning Appeal Tribunal

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Website: www.elfto.gov.on.ca Telephone: 416-212-6349 Toll Free: 1-866-448-2248