

Ontario Municipal Board
Commission des affaires municipales
de l'Ontario



ISSUE DATE: August 31, 2015

CASE NO(S): PL140666

PROCEEDING COMMENCED UNDER Subsection 53(19) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended

Applicant and Appellant:	Toronto District School Board
Subject:	Consent
Property Address/Description:	12 Bannockburn Ave.
Municipality:	City of Toronto
Municipal File No.:	B-017/14NY
OMB Case No.:	PL140666
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OMB Case Name:	Toronto District School Board v. Toronto (City)

Heard: November 13 to 14, 2014 and January 8, and May 13, 2015 in Toronto, Ontario

APPEARANCES:

Parties

Counsel

Toronto District School Board

C. MacDougall

City of Toronto

M. Longo

Save Bannockburn's Green Space

M. Bowman
A. Beale

**DECISION DELIVERED BY JASON CHEE-HING AND KAREN KRAFT SLOAN AND
ORDER OF THE BOARD**

CONTEXT

[1] The Toronto District School Board (“TDSB”, “Applicant/Appellant”, and “Proponent”) has appealed the decision of the City of Toronto (“City”) Committee of Adjustment (“COA”) to refuse to grant provisional consent to sever the subject property located at 12 Bannockburn Avenue.

[2] The TDSB had proposed to sever the subject property into two lots. The retained lot will continue to be leased by the Montessori School, which operates within the existing school building. The existing building is owned by the TDSB. The proposed severed lot, which has been declared surplus to the needs of the TDSB could be developed for residential purposes if the consent is granted.

[3] The subject property is zoned R6 under the Zoning By-law (“ZBL”) No. 7625, which permits both institutional and residential uses.

[4] The retained lot (Part 2) will have a lot frontage of 146.5 metres (“m”) on Haddington Avenue and Bannockburn Avenue, and a lot frontage of 79.3 m on Keslo Avenue. The lot area is 11,612 square metres (“sq m”). The conveyed lot (Part 1) will have a lot frontage of 108.7 m on Haddington Avenue and Bannockburn Avenue and a lot frontage of 79.4 m on Clyde Avenue. The lot area is 8,620 sq m. The dimensions are shown on the preliminary reference plan (Exhibit 1, Tab 2). The subject property is rectangular in shape and comprises an entire city block.

[5] At the hearing, the TDSB was represented by counsel and retained a professional planner. The City was represented by counsel and called two witnesses (a professional planner and its manager of parkland acquisition). The third party in these proceedings was the Save Bannockburn’s Green Space (“SBGS”), which was formed specifically to oppose the consent application and as stated by their representatives to preserve that part of the subject lands to be severed as open space. The SBGS was represented by counsel and called two lay witnesses (Alyssa Berenstein and Patricia

McMahon), and jointly retained a professional planner with the City. There were several participants (Karen Stintz, Morton Rosebaum, and Jennifer Arp) from the neighbourhood who spoke against the proposed severance application.

[6] The hearing was originally scheduled for two days (November 13 to 14, 2014). Due to the number of parties, witnesses and participants, the hearing continued for two more days (January 8, and May 13, 2015). This Panel of the Board encouraged the parties to have ongoing discussions during the break in the proceedings with the hope of resolving their issues. When the hearing resumed on January 8, 2015, the Board granted an adjournment request from the City and the TDSB so that the City staff could present a staff report with recommendation to Council at a council meeting to be held on February 9, 2015. The TDSB and the City advised the Board that settlement discussions had taken place during the intervening period and an offer for sale for part or all of the subject lands had been presented to the City.

[7] The Board granted the adjournment and set down May 13 to 14, 2015, for the continuation and completion of the hearing in the event that the settlement discussions were unsuccessful. Written reasons for the adjournment are contained in the Board's disposition, which was issued on January 16, 2015. At the scheduled council meeting, Council did not make a decision and deferred the matter. The hearing subsequently resumed and was completed on May 13, 2015.

POSITION OF THE PARTIES

TDSB

[8] The TDSB's representatives asserted that part of the subject lands is surplus to their needs and they followed the disposition process for the sale of the surplus lands properly and in accordance with the Ontario Regulation 444/98 of the *Education Act*. They argued that what is before the Board is a consent application and the Board is required to apply the statutory tests found in s. 51(24) of the *Planning Act* ("Act"). The

TDSB maintained that it should be no different if you are a public or private entity and that the consent application should be determined by the rule of law.

[9] The TDSB called evidence from a professional planner whose planning opinion was that the consent application had appropriate regard for all of the criteria found in s. 51(24) of the Act.

[10] The TDSB asserted that the City had ample opportunity to purchase all or part of the lands at fair market value but has not done so. They asserted that the City continues to have that opportunity to purchase the surplus lands for public open space provided that it is at fair market value.

[11] The TDSB maintains through its planning evidence that the zoning for the subject lands permits both institutional and residential uses and that fair market value would be based on the residential use of the surplus lands.

CITY

[12] The City's representatives argued that the appeal should be denied. They argued that it is not in the public interest to grant the consent so that the severed portion can be developed for residential purposes in an area where there is a serious deficiency of public parks.

[13] The City did agree that the consent application is a planning matter and subject to the statutory tests found in s. 51(24) of the Act. It is their position that the consent application fails to meet criterion b) in that it is not in the public interest and it is premature. The City called professional planning evidence in support of its position.

[14] The City's representatives asserted throughout the hearing that the City would like to purchase the surplus lands so that it could remain as public open space. They asserted that if the Board granted the consent that the surplus lands currently used as

open space by the residents would be permanently lost as parkland since it would be developed for residential purposes. This they argued would be prejudicial to the City and not in the public interest.

SBGS

[15] The SBGS's representatives maintained that the appeal should be denied. They asserted that the TDSB was not transparent and failed to follow the process for the disposition of surplus school lands. They maintained that the community was misled during the public review process as the consent application stated that the purpose of the consent was to sell the surplus land as a school site. They argued and brought planning evidence that the consent application failed to meet criteria a) and b) of s. 51(24) of the Act.

[16] The SBGS argued that the provision of parkland is part of the "orderly development of safe and healthy communities", which is a matter of provincial interest and that the proposed consent is not in the public interest. If the consent is granted then the surplus land would be lost as public open space in a community that is very deficient in parks. They maintained that this parkland deficiency would become more pronounced due to the anticipated residential intensification initiatives occurring in the nearby Avenue Road avenue corridor.

[17] The SBGS argued that the proposed use of the land is an important factor in determining whether the proposed consent is in the public interest and the public interest in this matter is the preservation of the surplus land as existing open space/playing field. They argued that the financial need of the TDSB to fund its capital requirements in order to maintain its existing schools is not a planning consideration for the consent application.

BOARD FINDINGS AND REASONS

[18] In deriving its findings, the Board considered all of the evidence (expert and lay) and submissions made during the proceedings.

[19] The statutory requirements when considering a severance application are found in s. 51(24) of the Act. The proposed severance must have regard for the following:

Criteria

(24) In considering a draft plan of subdivision, regard shall be had, among other matters, to the health, safety, convenience, accessibility for persons with disabilities and welfare of the present and future inhabitants of the municipality and to,

- (a) the effect of development of the proposed subdivision on matters of provincial interest as referred to in section 2;
- (b) whether the proposed subdivision is premature or in the public interest;
- (c) whether the plan conforms to the official plan and adjacent plans of subdivision, if any;
- (d) the suitability of the land for the purposes for which it is to be subdivided;
- (e) the number, width, location and proposed grades and elevations of highways, and the adequacy of them, and the highways linking the highways in the proposed subdivision with the established highway system in the vicinity and the adequacy of them;
- (f) the dimensions and shapes of the proposed lots;
- (g) the restrictions or proposed restrictions, if any, on the land proposed to be subdivided or the buildings and structures proposed to be erected on it and the restrictions, if any, on adjoining land;
- (h) conservation of natural resources and flood control;
- (i) the adequacy of utilities and municipal services;
- (j) the adequacy of school sites;
- (k) the area of land, if any, within the proposed subdivision that, exclusive of highways, is to be conveyed or dedicated for public purposes;
- (l) the extent to which the plan's design optimizes the available supply, means of supplying, efficient use and conservation of energy; and
- (m) the interrelationship between the design of the proposed plan of subdivision and site plan control matters relating to any development on the land, if the land is also located within a site plan control area designated under subsection 41 (2) of this Act or subsection 114 (2) of the *City of Toronto Act, 2006*.

[20] The Board finds that the consent application has appropriate regard to the criteria found in s. 51(24) of the Act. The Board's reasons follow.

[21] Alan Young, a qualified planner retained jointly by the City and the SBGS, testified that the proposed consent to sever failed to have regard to matters of provincial interest, that it was not in the public interest and that the application was pre-mature (criterion a) and b) of s. 51(24) of the Act). He testified that the area is deficient in the availability of parks scoring in the lowest two quintiles on a city-wide basis. He testified that this lack of open space/parks would become even more pronounced due to this neighbourhood's proximity to Avenue Road. Avenue Road is designated as an Avenue Corridor where future residential intensification is anticipated.

[22] It was Mr. Young's planning opinion that the consent is inconsistent with provincial policy (PPS and Growth Plan), which view adequate local parkland as a foundation for healthy and complete communities. In his opinion, the granting of the severance would not be good planning because opportunities to acquire additional parkland in the community are severely constrained. The impact on the community of granting the severance would be unacceptably adverse in his opinion. It is his opinion that the current availability of the open space/playing fields on the surplus lands alleviates the parkland deficiency in this area.

[23] This is in contrast to the planning evidence provided by Robert Dragicevic, a qualified planner for the TDSB. Mr. Dragicevic testified that the consent application is a planning matter and must be tested against the statutory requirements found in s. 51(24) of the Act. He testified that with respect to s. 2 of the Act that the provincial interest is being met as the retained portion of the subject lands would be maintained as a school site and the existing building would continue to be leased to the Montessori school. It was his opinion that the consent would be consistent with the PPS in that the TDSB would continue to provide a public service facility (school) on the subject lands. He testified that the proposed consent has regard for the criteria found in the s. 51(24) of the Act.

[24] The subject lands are zoned R6 under the applicable ZBL No. 7625 which permits both institutional and residential uses. He testified that the original consent application did indicate that the proposed severed lot would be used for school purposes. However, the interest expressed by other school boards (Catholic and French) with respect to the purchase of the surplus lands did not come to fruition. He testified that the City did express its intent to purchase the surplus land but never submitted an offer to the TDSB. The surplus land can still be available for a school or residential purposes if the consent is granted. He testified that the consent application is not about the suitability of permitted uses but whether it meets the criteria found in s. 51(24) of the Act.

[25] It is his opinion that the proposed consent is in the public interest as the existing school would continue to be maintained, that residential intensification is also a provincial objective, and that there is no pre-maturity as the existing zoning permits residential use.

[26] Both the City and the SBGS's opposition to the consent application are primarily rooted in their position that it fails to meet criteria a) and b) of s. 51(24) of the Act – the impact of development on matters of provincial interest and whether the proposed consent is premature or in the public interest.

[27] It is the Board's view that on these two points, the consent application did have regard for the provincial interest in that it will continue to provide for an educational use on the retained portion of the lands while meeting the provincial residential intensification policies found in both the PPS and the Growth Plan. It is the Board's finding that the consent application is not pre-mature and that it is in the public interest.

[28] On the matters of the provincial interest and the public interest, the Board does recognize that in these matters there are several provincial and public interest concerns that must be carefully considered. There is the need for the orderly development of safe and healthy communities. The City and the SBGS asserted that the availability of open

space/parkland is integral to this need. There is the adequate provision of educational facilities, which the TDSB has argued they have met by the continued existence of the Montessori school on the retained portion of the subject property. There is the provision of a full range of housing and the provincial policy of residential intensification. All these provincial interests are found in s. 2 of the Act and they are all matters of the broader public interest as well.

[29] The Board had to evaluate these matters of the provincial and broader public interest and test them against the evidence and submissions presented at this hearing. Also, in the Board's view, an important consideration is that the City still has the option of acquiring part or all of the surplus land for parkland purposes. The evidence given by the City's manager of parkland acquisition, David Douglas, and by Ms. Stintz, the former ward councillor for this area, is that the City does have the funds to acquire part or all of the surplus land as part of its parkland acquisition program. The TDSB had made it quite clear they are willing to consider an offer to purchase from the City.

[30] It is the Board's finding that the proposed consent will have regard for the provincial interest and the public interest by maintaining the objectives of providing for educational facilities and meeting the residential intensification initiatives and providing for a full range of housing should the surplus land be eventually developed for housing. The provision of parkland is a municipal responsibility. The City has the option of purchasing the surplus land from the TDSB in the open market if it wishes to acquire this land for a park.

[31] At this juncture, the Board wants to clarify a misconception that some of the residents may have about the portion of the TDSB property that is deemed surplus. It is not a park. The entire subject property is owned by the TDSB. The open space/playing field used by local organizations to host organized sport events have been with the permission of the TDSB. While the residents may have come to view it as a "park" due to its long time use as open space and playing field it is not parkland.

[32] The Board notes that the City always had the option of purchasing a portion of the surplus lands for parkland purposes. The evidence at these proceedings is that the City has not submitted an offer to purchase. In fact, the lay evidence of former City councillor Ms. Stintz that the City has the funds available to purchase the surplus land played a large role in the Board encouraging the parties to engage in settlement discussions during the break in the proceedings.

[33] Although these settlement discussions proved to be unsuccessful, the City still has the option of purchasing the surplus portion of the lands (conveyed portion) based on fair market value. This, in the Board's view, appears to be the crux of the City's opposition to the consent application, which is the unwillingness to pay fair market value for the surplus lands. Ms. Stintz was candid about this. In her testimony, she said that the City is very reluctant to pay for the surplus land based on its potential for residential development.

[34] In this regard, the Board notes the evidence of Mr. Dragicevic that the City staff were well aware of the concept plans for residential development of the surplus lands in a pre-consultation meeting held in November of 2013. This was not challenged in cross-examination of Mr. Dragicevic. The City's manager of parkland acquisition, Mr. Douglas, testified that the City had the funds to acquire the surplus land as part of its parkland acquisition program and has the in-house expertise to conduct qualified appraisals before an offer is made. Under cross-examination, Mr. Douglas acknowledged that his department was aware of the TDSB's intent to offer the surplus lands for sale in the open market where the highest and best use would be for residential development. For the City to submit during these proceedings that it was not aware of the TDSB's intent with respect to the developable potential of the surplus lands as residential rings a bit hollow to this panel of the Board.

[35] The Board acknowledges the community's concerns as expressed through the participants to keep the surplus land as open space as the residents currently use it. Clearly the residents of this neighbourhood have for a considerable length of time used

the TDSB surplus land as open space and as a park. The residents want the surplus land to be kept as a "park". The option is still available to the City to acquire the surplus land from the TDSB through a negotiated sale.

[36] It is for all these reasons that the Board will allow the appeal and grant provisional consent. The City had submitted that should the Board find merit in approving the TDSB's consent application that the Board attach certain conditions of approval acceptable to the City (Exhibit 6). The TDSB did not object to this request.

ORDER

[37] The Board Orders that the appeal is allowed and provisional consent is to be given subject to the conditions attached hereto as Attachment 1.

"Jason Chee-Hing"

JASON CHEE-HING
MEMBER

"Karen Kraft Sloan"

KAREN KRAFT SLOAN
MEMBER

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

Ontario Municipal Board

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ATTACHMENT 1

Conditions of Approval

Prior to the issuance of the certificate by the Manager and Deputy Secretary Treasurer, Committee of Adjustment, North York District:

1. Confirmation of payment of outstanding taxes to the satisfaction of Revenue Services Division.
2. A draft Certificate of Official, as prescribed in O.Reg. 197/96 as Form 2 or 4 in a form satisfactory to the Deputy Secretary-Treasurer, that includes a completed and registerable description of the land that is the subject of the consent, shall be submitted to the Deputy Secretary-Treasurer within one year of the date of the giving of notice of the Decision.
3. Copies of a deposited Reference Plan of Survey, integrated with the Ontario Co-ordinate System, and clearly delineating the parcels of land approved by the Committee of Adjustment. A listing of the PARTS and their respective areas is required.
4. A copy of a letter from the Executive Director of Technical Services advising that the applicant has obtained the necessary adjustment to the municipal addressing of the land. Contact Survey and Mapping Services, Technical Services at (416) 392-7755. The application for municipal addressing must be accompanied by a copy of the deposited Reference Plan of Survey, integrated with the Ontario Co-ordinate System, and specify the PART numbers that will comprise each of the new parcels.
5. This Decision shall become null and void within 12 months unless the Certificate of the Committee of Adjustment is affixed to the relevant documents.
6. The applicant shall retain a consultant archaeologist, licensed by the Ministry of Tourism, Culture and Sport, under the provisions of the Ontario Heritage Act (R.S.O 1990 as amended) to carry out a Stage 1-2 archaeological assessment of the entire development property and follow through on recommendations to mitigate, through preservation or resource removal and documentation, adverse impacts to any significant archaeological resources found. The assessment is to be completed in accordance with the 2011 Standards and Guidelines for Consulting Archaeologists, Ministry of Tourism, Culture and Sport.
7. The consultant archaeologist shall submit a copy of the relevant assessment report(s) to the Heritage Preservation Services Unit in both hard copy format and as an Acrobat PDF file on CD.
8. No demolition, construction, grading or other soil disturbances shall take place on the subject property prior to the City's Planning Division (Heritage Preservation Services Unit)

and the Ministry of Tourism, Culture and Sport (Heritage Operations Unit) confirming in writing that all archaeological licensing and technical review requirements have been satisfied.

9. A draft Reference Plan of Survey shall be submitted to the Executive Director of Engineering and Construction Services for review and approval, prior to depositing in the Land Registry Office, in metric units and integrated with the Ontario Co-ordinate System, showing as separate PARTS thereof the lands to be conveyed to the City and the remainder of the site including any appurtenant rights-of-way;

The owner shall pay all costs for registration and preparation of reference plan(s).

10. Despite any other general or specific provision in Zoning By-law No. 7625 of the former City of North York, enacted under section 34 of the Planning Act or its predecessor section the following shall apply:

- (1) for a ONE FAMILY DETACHED DWELLING, SEMI-DETACHED DWELLING, DUPLEX DWELLING, DOUBLE DUPLEX DWELLING, TRIPLEX DWELLING, MULTIPLE ATTACHED DWELLING, BOARDING OR LODGING HOUSE, CONVERTED DWELLING, the elevation of the lowest point of an opening to an area that may be used for parking or storage of a vehicle located inside or abutting the dwelling shall be:

- a) higher than the elevation of the street, arterial road or minor arterial road, the lot abuts measured at its centreline directly across from the driveway leading to the parking space; and
- b) higher than the elevation of a public lane that the lot abuts measured at its centreline directly across from the driveway leading to the parking space.

11. The land to be conveyed not be offered for sale on the open market before February 1, 2015.